Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

v.

ALAMEDA BOOKS, INC. and
HIGHLAND BOOKS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a city's zoning ordinance, which prohibits the operation of more than one adult entertainment business at a single location, including an adult bookstore and an adult arcade, invalid because the city did not study the negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions?

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CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit was initially filed July 27, 2000, and, as amended August 28, 2000, is reproduced at Appendix ("App.") A to the petition. It is reported at 222 F.3d 719 (9th Cir. 2000). Concurrently with filing the amended opinion, the Court of Appeals denied Plaintiffs/Appellees' Petition for Rehearing. App. 2. Defendant-Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc was denied September 18, 2000, and is reproduced at App. D to the petition.

The May 28, 1998 Order of the District Court granting, *inter alia*, plaintiffs' motion for summary judgment, which was unreported, is reproduced at App. B. The Judgment and Permanent Injunction filed May 28, 1998, is reproduced at App. C.

JURISDICTION

The decision of the Court of Appeals was initially entered on July 27, 2000. App. 1.

Respondents filed a timely Petition for Rehearing by Panel, which was denied August 28, 2000. App. 2. Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing *en banc*, which was denied September 18, 2000. App. 59. The Petition for Writ of Certiorari is timely filed within 90 days of that date in accordance with Rule 13.3 of the Rules of this Court.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part that:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1983 of Title 42 of the United States Code provides in pertinent part that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Ordinance Nos. 151294, 157538 and 158579 of the City of Los Angeles are printed in Appendices E, F and G respectively.

STATEMENT OF THE CASE

A. The City of Los Angeles' Adult Entertainment Ordinance

Following this Court's decision in *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976) (*Young*), the Los Angeles City Council instructed the Planning Department to undertake a study "to determine whether and to what extent the concentration of . . . adult businesses has a blighting and degrading effect upon the neighborhoods in which they are situated." App. 60.

In June, 1977, the Planning Department completed a comprehensive study entitled "Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles." ("1977 Study"). The 1977 study documented that the concentration of adult entertainment businesses resulted in increased crime, decreased property values, and generally caused blight and other negative impacts in the neighborhoods where they concentrated[1]. Following a public hearing, the Planning

[1] The 1977 Study has been held by the federal courts, including this Court, to be a sufficient evidentiary basis to uphold ordinances from other jurisdictions regulating various aspects of adult businesses on numerous occasions. See, *e.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 236 (1990) [regulating minimum hours to rent rooms in adult motels]; *Hart Book Stores,*

Commission recommended to the City Council that it adopt an ordinance to require all adult entertainment businesses[2] be separated from each other by 1000 feet and located at least 500 feet from schools, religious institutions and parks.

On July 18, 1978, the City Council enacted Ordinance No. 151294 adding § 12.70 to the Los Angeles Municipal Code[3]. App. E. Pertinent to this lawsuit, Ordinance No. 151294 added § 12.70 C, which provided:

> "No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theater, Adult Theater, Massage Parlor or Sexual Encounter Establishment within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park within the City of Los Angeles." App. 67.

Inc., 612 F.2d 821, 829 n. 10 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980) [number of adult business at one location]; *Buzzetti v. City of New York*, 140 F.3d 134, 136 (2nd Cir. 1998), *cert. denied*, 524 U.S. 924 (1998) [location requirements].

[2] An "Adult Entertainment Business" is defined as an "Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theatre, Adult Theatre, Massage Parlor, or Sexual Encounter Establishment, as defined herein. . . . " App. 70.

[3] Section 12.70 B (1) defined an "adult arcade," and § 12.70 B (2) defined an "adult bookstore." App. 62. These definitions are not at issue here, nor do plaintiffs assert that their businesses are not adult bookstores or arcades within the meaning of the ordinance.

Section 12.70 D was also added which provided, in pertinent part:

> "The distance between any two adult entertainment businesses shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of each business." App. 67.

In 1982, it was discovered that the "measurement of distance" provision subsection D, *supra*, was being interpreted "in such a manner as to permit a combination of such businesses to be located within the exterior structural walls of a single building at one site." The intent in originally adding § 12.70 to the Municipal Code "was to provide for the dispersion of all adult entertainment business in the City," and thus "it is quite apparent that the Council in no way intended to allow more than one such business to be established at a single location in the same building." A motion was introduced to amend § 12.70 in order to remove any ambiguity about the Council's intent to disperse all adult entertainment businesses.

The matter was referred to the Council's Planning and Environment Committee, which referred the matter to the Planning Commission for study and recommendation. The Planning Commission held a public hearing on a draft ordinance to clarify the Council's legislative intent. Following the public hearing, the Planning Commission adopted the staff report and findings, and recommended the ordinance be adopted. The staff report described the need for the ordinance as follows:

> "The intent of the City Council in enacting the existing adult entertainment zoning regulations in 1978 was to provide for the dispersion

> of *all* adult entertainment business in the City. *This being the case, it is quite apparent that the Council in no way intended to allow more than one such business to be established at a single location in the same building.* However, the . . . language [in § 12.70] relating to the measurement of distances . . . has resulted in an ambiguity with respect to the number of businesses which may be permitted within the 'exterior structural wall' of an establishment at one location. . . . Thus the need has arisen to enact the . . . subject proposed ordinance."

Further, the report stated that "[e]nactment of the subject ordinance is necessary to clarify, on a permanent basis, existing provisions of the Adult Entertainment Zoning regulations contained in Section 12.70 of the Municipal Code. It is apparent that in enacting these regulations in 1978, the City Council did not intend to permit more than one adult business in the same building at one location."

On March 16, 1983, the City Council adopted Ordinance No. 157538 (App. F), amending § 12.70 to add § 12.70 B (17) to *expressly* prohibit more than one of the previously defined adult entertainment business at the same location and to make clear that "each shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." App. 70-71. Section 12.70 C was also amended at that time to specifically prohibit more than one adult business in one building. App. 71. Ordinance 158579 (App. G), enacted December

16, 1983[4], further clarified the legislative intent and resulted in the current version of the first paragraph of § 12.70 C[5], which is the subject of this litigation. Subsection C provides:

> "No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an adult entertainment business within 1,000 feet of another adult entertainment business or within 500 feet of any religious institution, school or public park within the City of Los Angeles. No person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof, or the increase of floor area of any adult entertainment business in any building, structure or portion thereof containing another adult entertainment business." App. 77.

B. The Two Plaintiffs

Alameda Books commenced operation in 1987, closed in 1990 and reopened in 1993 at a different store within the same shopping center in the City. It operates both an adult bookstore and adult video arcade with 15 viewing booths.

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[4] These amendments to § 12.70 did not change the 1000 foot separation requirement between adult businesses originally enacted in 1978 or the definitions of an "adult bookstore" and "adult video arcade" and their validity was not challenged below.

[5] This provision of § 12.70 C has been referred throughout this litigation as the "multi-use prohibition."

Highland Books began operation in the City in 1987 as an adult arcade, and, commencing in June, 1991, first began operating an adult bookstore at the same location. The adult video arcade has 19 viewing booths.

Both Alameda Books and Highland Books began operating adult bookstores and adult video arcades in the same locations well after the January 23, 1984, effective date of Los Angeles Ordinance No. 158579 (App. G). Highland Books admits that it "has been openly operating in non-compliance with this 'multiple-use prohibition' since June, 1991," and Alameda Books admits that it has "been openly operating in violation of this provision since approximately November of 1993." Further, the plaintiffs waived any argument that an adult arcade cannot economically operate independent of an adult bookstore.

C. Proceedings Below

Plaintiffs filed their Complaint for Declaratory Relief and Injunctive Relief Under 42 U.S.C. § 1983 on November 15, 1995. The First Cause of Action was for "Declaratory And Injunctive Relief Under 42 U.S.C. § 1983 To Prevent Threatened Enforcement Of Portions Of L.A.M.C. § 12.70 Prohibiting Two Or More Adult Entertainment Businesses In Same Building." The City filed its answer on March 8, 1996. The parties filed cross-motions for summary judgment or summary adjudication of the issues which were argued on October 20, 1997. The District Court denied the cross-motions for summary judgment on January 12, 1998, and set the matter for trial.

Plaintiffs filed motions to reconsider the First Amendment portion of the District Court's January 12, 1998 Order. App. 22-23. The Court heard oral argument on April 13, 1998 (App. 23), and on May 28, 1998, issued a new order granting the motion for reconsideration of the First Amendment portion of the previous order. App. 22. The new order vacated the prior order denying summary judgment (App. 54) and granted plaintiffs' motion for summary adjudication of the First Cause of Action. App. 55. The court concluded that the City's multiple use prohibition was not a content neutral secondary effects regulation and was therefore an invalid prior restraint. App. 54. The new order rendered moot the remaining causes of action in the complaint (App. 54) including whether the City's multi-use prohibition allowed "for reasonable alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (*Renton*).

Judgment was entered for the plaintiffs, and an injunction against the enforcement of Section 12.70 C was granted. App. 57-58.

The Court of Appeals for the Ninth Circuit affirmed. App. 3. Although the court conceded that the City had a substantial government interest in reducing crime in its neighborhoods, it held that the multi-use prohibition did not serve that interest because of a failure of proof. App. 11-12. The court determined that the 1977 Study was insufficient to show that this particular combination of sexually explicit adult businesses contributed to the negative secondary effects caused by the concentration of such businesses identified in the 1977 Study. *Id.* The court therefore concluded that it was unreasonable for the City to conclude that a combination of an adult bookstore and

adult video arcade would have harmful secondary effects. App. 15.

REASONS FOR GRANTING THE WRIT

The opinion of the Court of Appeals deals with an issue of federal constitutional law in a way which directly conflicts with this Court's decision in *Renton* and necessarily brings its decision into conflict with other circuit courts of appeals. The Ninth Circuit held that the City must first study the negative effects of each combination of adult businesses and then apply those findings to the particular problems or needs of the City. As discussed in Part B, *infra*, this reasoning and result are the same as in its prior decision, *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir. 1984) (*Playtime Theatres*), which this Court reversed in *Renton*.

Renton stands for the proposition that a City need not await the entry of adult businesses and the consequent negative effects before it can zone to regulate adult businesses. Further, *Renton* does not require a city council to independently investigate or corroborate each potential problem when it acts in furtherance of the public interest. All that is required is that the evidence relied on need be "reasonably believed to be relevant to the problem that the city addresses." *Renton, supra*, 475 U.S. at 50-51. The Ninth Circuit now requires that before a city can zone to regulate adult businesses the city must have direct, corroborating evidence that the regulated business contributes to the already proven negative secondary effects

associated with adult businesses, an impossible burden to meet.

As discussed in Part A, *infra*, there is, then, a substantial conflict among the circuits as to the proper standard a court should use in evaluating the constitutionality of an adult entertainment zoning ordinance. The opinion below conflicts with the decisions of the Courts of Appeals for the Third Circuit, *Mitchell v. Com'n on Adult Entertainment Est.*, 10 F.3d 123 (3rd Cir. 1993), the Eighth Circuit, *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994), *cert. denied*, 513 U.S. 1017 (1994), the Tenth Circuit, *Z.J. Gifts v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998), *cert denied*, 525 U.S. 868 (1998) and the Eleventh Circuit, *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1554 (2000). These circuits look to the purpose of the ordinance as a whole and, if it can be shown that adult entertainment businesses as a class or category contribute to the undesirable secondary effects, then the ordinance passes scrutiny under the First Amendment. They do not require a city to separately study the negative impacts of individual businesses. Rather, if evidence supports the need for zoning regulations for some adult businesses, it is constitutionally permissible to regulate all businesses that can be characterized as "adult entertainment."

The Ninth Circuit opinion in this case also conflicts with a decision of the Court of Appeals for the Fourth Circuit, *Hart Book Stores, Inc. v. Edmisten* (*Hart*), *supra*, which held that the specific zoning tool employed by the City, prohibiting more than one sexually explicit business at a location, did not violate the First Amendment. Both the trial court (App. 45) and the Court of Appeals (App.

19) agreed that the regulation in *Hart* was the same as the one adopted by the City. *Renton* permits a city's reliance on opinions such as *Hart* to support the municipal zoning regulation. *Renton, supra,* 475 U.S. at 50-51 (Renton entitled to rely on a 1978 opinion of the Supreme Court of Washington). For these reasons this case warrants review in the form of a writ of certiorari. See Rule 10(a) of the Rules of the Supreme Court of the United States.

A. The Decision Of The Ninth Circuit Court of Appeals Is In Conflict With Five Other Circuits.

At least four other circuit courts of appeals have considered and rejected the rationale used by the Ninth Circuit to invalidate the City's zoning regulation. The Ninth Circuit determined that this City's 1977 Study was insufficient to justify the City's regulation because the study (1) "did not analyze an individual bookstore/arcade combination as a concentration of adult businesses (App. 12), (2) "was not directed at determining the impact of individual adult entertainment business units (*id.*), and (3) did not "identify any harmful secondary effects resulting from bookstore/arcade combinations as individual business units." App. 13. In that court's opinion, the "Study contains no findings that an individual combination bookstore/arcade produces any of the increased crime the Study found resulting from a concentration of adult businesses." App. 15. "Therefore," said the court, "it is unreasonable for the City to infer that absent its regulations, a bookstore/arcade combination would have harmful secondary effects." *Id.*

The Ninth Circuit's standard for evaluating the constitutionality of an adult entertainment zoning ordinance has been rejected elsewhere. One circuit has stated simply: "That is simply not the law." *ILQ Investments, Inc. v. City of Rochester, supra,* 25 F.3d at 1418 (*ILQ*). In *ILQ*, the Eighth Circuit reversed a district court ruling "that the City was unreasonable in relying upon other cities' studies because they did not specifically address businesses similar to Downtown Book and Video, that is, adult bookstores 'that offer both sexually explicit and non-sexually explicit materials and allow only off-premises consumption of those materials.' " *Id.* at 1417. The Eighth Circuit rejected ILQ's assertion that Rochester had to disregard that city's studies because they did not evaluate bookstores with no on-site viewing offering both adult and non-adult fare. *Id.* at 1418.

After noting the "thorough legislative process" undertaken by Rochester in enacting its zoning regulations (*id.* at 1417), the *ILQ* court held that the evidence relied on by Rochester need not prove that the *plaintiff's business* produced "the exact same adverse effects on its surroundings" as other adult businesses. It was legally sufficient for the city to show that plaintiff's business was one of the categories of businesses "reasonably believed to produce at least some of the unwanted secondary effect." *Id.* at 1418. "Even if Downtown Book and Video is a new type of adult business, it may not avoid a time, place and manner regulation that has been justified by studies of the secondary effects of reasonably similar businesses." *Id.* Because Rochester's ordinance "affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects,

Rochester 'must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.' (Citation omitted.)" *Id.*

Based on the "more flexible" Eighth Circuit standard (App. 18), the City's ordinance is valid under *Renton* because it seeks to regulate only categories of businesses reasonably believed to produce the very serious identified secondary effects caused by concentrations of sexually explicit businesses. A concentration of sexually explicit businesses in one building is, when all is said and done, reasonably similar to, if not identical with, a concentration of adult businesses next door to or down the block from each other.

In *Mitchell v. Com'n on Adult Entertainment Est.* (*Mitchell*), *supra*, an adult bookstore and video arcade (*Mitchell, supra*, 10 F.3d at 127) challenged a Delaware statute restricting the hours of operation for sexually explicit businesses. *Id.* at 128. The plaintiff asserted that there was insufficient evidence before the legislature "to support its conclusion that the asserted undesirable secondary effects it seeks to regulate resulted from the protected activity, or if it did, that the closing-hours amendment would reduce them." *Id.* at 132. The Court of Appeals held that there was a substantial government interest in the regulation because it "was amply demonstrated that the amendment was passed to control the socially undesirable effects incidental to the operation of adult entertainment establishments." *Id.* at 137. "The perceived effects are akin to those created by a public nuisance." *Id.*

The *Mitchell* court rejected the argument that the statute was not narrowly tailored because plaintiff's particular location was not shown to contribute to the identified adverse effects. It also rejected the argument that a survey of adult bookstores in Delaware was required in order to "determine the effect the statute or regulation will have on each." *Id.* at 138. Rather, the court concluded that the state "need only show that adult entertainment establishments *as a class* cause the unwanted secondary effects the statute regulates." *Id.*, emphasis added.

The Ninth Circuit's decision below conflicts with yet a third Court of Appeals decision, *Z.J. Gifts v. City of Aurora, supra*. The City of Aurora, Colorado, enacted a zoning ordinance which, *inter alia*, regulated a bookstore that sold and rented adult materials for viewing off premises. *Z.J. Gifts, supra*, 136 F.3d at 685. The district court enjoined the ordinance "because it believed 'none of the material relied on by the city council shows the business of Christie's bears any relationship to [harmful secondary] effects.' " *Id.* at 686. The Court of Appeals reversed, rejecting in the Tenth Circuit the rationale used by the Court of Appeals here.

The *Aurora* court held that the evidence relied on to justify the ordinance need only support the City's general purpose in enacting the ordinance, and that "differences in the mode of delivery of sexually oriented materials are constitutionally insignificant for purposes of determining an ordinance's content-neutrality." *Id.* at 687. The court's "analysis of Aurora's interest in regulating sexually oriented businesses thus remains unaffected by the district court's distinction between off-site and on-site viewing of sexually explicit materials." *Id.* at 688. The ordinance

regulated the category of businesses producing the unwanted secondary effects (*id.* at 687) and did not attempt to regulate businesses that had "a minimal or nonexistent connection to sexually oriented entertainment." *Id.* at 689. Therefore, the bookstore owner could not be heard to complain that the zoning regulations could not be constitutionally applied to it because it was a new or different type of sexually oriented business. *Id.* at 690.

Here, as in *Z.J. Gifts*, the characterization of the combination of an adult bookstore and adult video arcade as a new or unique type of business (as is, by the way, any other conceivable combination of adult businesses within the City) should not affect the underlying analysis that these types of businesses collectively cause serious negative impacts. Given the uncontroverted explicit sexual nature of these businesses, they should not be permitted to avoid regulation by creating an artificial distinction based upon the mode or manner of operation because such a "distinction is constitutionally irrelevant in determining whether [Los Angeles'] interests are important or substantial, particularly in light of the [Supreme] Court's strong statements regarding the government's interest in regulating such businesses in *Young* and *Renton*." *Id.* at 688.

The Court of Appeals for the Eleventh Circuit recently rejected the rationale of the Ninth Circuit below in *Lady J. Lingerie, Inc. v. City of Jacksonville (Lady J.), supra*, 176 F.3d at 1365. In *Lady J.*, " 'lingerie shops' that showcase(d) nude dancing" (*id.* at 1360) challenged, *inter alia*, the city's regulation limiting their hours of operation. *Id.* at 1365. The Eleventh Circuit rejected the argument raised

by the plaintiffs, which was identical to the rationale used by the Ninth Circuit below. The lingerie shops argued that Jacksonville needed to show a substantial government interest to justify its regulation on an hour-by-hour basis. *Id.* The Court of Appeals rejected the argument:

> "The plaintiffs concede that ample evidence exists to justify requiring them to close during the late evening hours, so that the hours of operation rule *as a whole* indisputably serves a substantial government interest. Both the plaintiffs would have us look at the City's reasons for this rule on an hour by hour basis. There is no evidence, they submit, of a substantial government interest to justify requiring adult businesses to close from 10:00 a.m. until noon. This is a clever argument, but it confuses the requirement that a regulation serve a substantial government interest with the requirement that it be narrowly tailored to that end. We look at the provision *as a whole* to decide whether it serves a substantial government interest. Since it does, we ask whether it is narrowly tailored." *Id.*, emphasis in the original.

The court explained the practical reason for its holding thusly:

> "If we were to side with the plaintiffs here, the next litigants would argue whether evidence of secondary effects at 6:15 in the morning justifies requiring adult businesses to close at 9:30, or whether evidence from 9:30 justifies requiring them to close at 10:45. That sort of line-drawing is inconsistent with a narrow tailoring requirement that only prohibits regulations that 'are substantially broader than necessary.' (Citations.)" *Id.*

In this case, the Ninth Circuit decision adopted the approach rejected by the Eleventh Circuit and parsed the Los Angeles regulations into discrete parts, requiring the City to show that a substantial government interest supports each part. Under the Eleventh Circuit test, the court is required to determine whether the City's zoning regulation as a whole serves a substantial government interest. Under that test, the City's zoning ordinance regulating sexually explicit adult businesses is indisputably valid.

The issues in these four cases differ slightly from the one here[6]. However, what is important from the standpoint of constitutional doctrine is not the precise issue but the contrast of the Ninth Circuit's analysis with that of the other circuits. The analytical approaches of the other circuits are consistent with each other. Under their approach the city need only show that "categories" or "classes" of businesses cause the identified negative problems. Unlike its sister circuits, the Ninth Circuit did not evaluate the City's zoning regulations as a whole. The City is entitled under this Court's decisions to place sexually explicit entertainment establishments in different categories from other entertainment businesses so long as there is evidence that, as a group, they cause adverse impacts on surrounding neighborhoods.

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[6] In the view of the Ninth Circuit, the fatal defect in the City's regulation was that the 1977 Study neither analyzed the impacts of any two businesses at one location as a concentration, nor the impact of individual sexually explicit businesses on the negative secondary effects. App. 12.

The Court of Appeals created a conflict with a fifth circuit when it dismissed the City's reliance on *Hart, supra*. App. 20. *Hart* "examined a state law almost identical to the Los Angeles Ordinance" (App. 19), and held "constitutional a North Carolina statute prohibiting two or more 'adult establishments' from occupying a single building." App. 19-20. The Fourth Circuit concluded that its decision was controlled by this Court's decision in *Young* (*Hart, supra*, 612 F.2d at 824) and, after carefully comparing the operative features of the Detroit ordinance at issue in *Young* with the North Carolina statute, held that "the North Carolina statute to be merely a regulation of the place and manner of expression, without proscription of that expression. . . . " *Id.* at 826. The court explained that:

> "The North Carolina statute, like the Detroit Ordinance, is aimed at prohibiting a 'supermarket' marketing technique that offers for sale or exhibition at one business location a variety of sexual wares in addition to printed materials. Comparable regulation of specific techniques and methods of commerce in erotic material has not been thought violative of First Amendment values." *Id.* at 826.

Hart stands for the unambiguous proposition that it is permissible under the First Amendment to separate adult bookstores and adult arcades. The Ninth Circuit decision to the contrary creates a clear conflict among the circuits which this Court should resolve.

Moreover, the Ninth Circuit's dismissal of *Hart* because it was decided before *Renton* does not support the court's analysis. Whether *Hart* was decided before or

after *Renton* is irrelevant. The question is whether *Hart* is consistent with *Renton*, and the Ninth Circuit did not address that question. That *Hart's* rationale and result are fully consistent with *Renton* cannot reasonably be challenged because, as in *Hart*, "the resolution of [*Renton* was] largely dictated by our decision in *Young*. . . . " *Renton, supra*, 475 U.S. at 46.

In language foreshadowing this Court's *Renton* decision, the *Hart* court concluded that the North Carolina "regulation furthers an important or substantial interest" (*id.* at 828), explaining that:

> "North Carolina certainly has a substantial interest in maintaining a stable, healthful environment in its cities. The legislature could reasonably have determined that the development of the 'total, under one roof' approach to the marketing of sexually explicit materials and devices tended to produce secondary effects destructive of the general quality of life in the neighborhood. . . . A legislative determination that the dispersal of the marketing activities might ameliorate the secondary effects to some extent, thereby furthering the state's interest, cannot be thought unreasonable. (Citation and footnote 10 omitted)." *Id.* at 828-829.

The first sentence in footnote 10 from the above quotation states that "[o]ther decisions have found similar location restrictions for adult establishments justified as zoning to serve the legitimate interests in preserving residential neighborhoods and preventing urban decay." *Id.* at 829 n. 10. The footnote cites to, and quotes from, the City's 1997 Study as support for that proposition. Viewed in context, one readily sees that *Hart* anticipates *Renton*

and stands for the unremarkable proposition that a zoning regulation prohibiting more than one adult business at a location is a reasonable and permissible tool to regulate the dispersal of adult businesses approved in *Young*. Where, as here, the regulation is justified without reference to the content of the regulated speech and directed at the secondary effects of sexually explicit businesses in the surrounding community, it is not aimed at the suppression of speech and is a content neutral time, place and manner regulation under *Renton*. *Boos v. Barry*, 485 U.S. 312, 319-321 (1988).

With respect to the decision of which zoning tool to use, this Court has required the lower courts to defer to the legislative determination, leaving open the issue of whether the tool used "allows for reasonable alternative avenues of communication." *Renton, supra*, 475 U.S. at 50. The City's regulation is fully consistent with the City's legislative determination that the better regulatory approach in Los Angeles to address the serious problems it faced was to disperse all adult entertainment businesses without exception using the Detroit model.

As demonstrated above, there is a significant conflict between the circuits on the proper application of *Renton*. This significant conflict can only be resolved by this petition for writ of certiorari.

B. The Decision Of The Court Of Appeals Directly Conflicts With This Court's Decision in *Renton*.

The opinion of the Court of Appeals effectively turns back the calendar in the Ninth Circuit on the law governing locational zoning regulations for adult entertainment

businesses to February 24, 1986, the day before this Court filed its decision in *Renton* which reversed the Ninth Circuit's decision in *Playtime Theatres, supra*. The similarity in reasoning between the Court of Appeals' 1984 decision and the one here is remarkable. The result is, of course, identical: an otherwise content neutral time, place and manner zoning regulation on the location of sexually explicit adult businesses is held unconstitutional for an imagined failure of proof by the municipality to justify the regulation. In *Renton*, this Court disapproved the rationale which led to that result, stating that "the Court of Appeals imposed on the City an unnecessarily rigid burden of proof." *Renton, supra*, 475 U.S. at 50. Here, the burden of proof imposed on cities by the Ninth Circuit goes beyond being merely "rigid" to virtually impossible.

The Ninth Circuit in 1984 held that the City of Renton failed to show that it had a substantial government interest in regulating zoning of adult theaters because the City of Renton had neither studied the secondary effects of adult theaters, nor applied any such findings to the particular problems or needs of Renton. *Playtime Theatres, supra*, 748 F.2d at 537. Because Renton had relied upon the experiences and studies of other cities, the Ninth Circuit held that the city's findings were conclusionary and speculative as applied to Renton since the documented problems of other cities concerning adult uses were "simply not relevant" to Renton. *Id.*

This Court specifically rejected the Ninth Circuit's reasoning as "unnecessarily rigid" because the Renton ordinance "was aimed at preventing the secondary effects of even *one* such [adult] theater in a given neighborhood." *Renton, supra*, 475 U.S. at 50, emphasis added. This

Court held that Renton could rely upon the detailed findings of the City of Seattle in enacting its ordinance:

> "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses. That was the case here. *Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question* either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton." *Id.*, at 51-52, emphasis added.

This Court then went on to state:

> "We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. 'It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems. (Citation omitted.) Moreover, the Renton ordinance is "narrowly tailored to affect only that *category* of theaters shown to produce the unwanted secondary effects. . . . " *Id.* at 52, emphasis added.

Renton set forth a three-step, four-factor analytical framework for analyzing the constitutionality of a zoning

ordinance regulating adult entertainment businesses. The Los Angeles ordinance under review here meets this Court's test.

The first step asks: Is the ordinance a "time, place, and manner regulation?" *Id.* at 46. An ordinance meets this test if "it does not ban adult [businesses] altogether." *Id.* The Los Angeles zoning regulation does not ban adult businesses and meets this part of the *Renton* test.

The second analytical step is whether the challenged zoning regulation is "content neutral." *Id.* at 47. "[W]ith respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." *Id.* at 49. The Los Angeles zoning regulation challenged here is solely designed to address the proven significant secondary effects associated with the concentration of sexually explicit adult businesses within the City. It meets the second step of the *Renton* test.

The third *Renton* step is two-fold, whether the "ordinance is designed to serve a substantial governmental interest *and* allows for reasonable alternative avenues of communication." *Id.* at 50, emphasis added. A municipality's concern about the quality of life and the need to mitigate the negative secondary effects associated with adult entertainment businesses are important and substantial governmental interests. *Id.* at 50; *Young, supra,* 427

U.S. at 71-73. Clearly, this City's prophylactic zoning regulation serves a substantial government interest[7].

The Court of Appeals' decision in this case renders meaningless *Renton's* straightforward analytical framework in favor of a new standard purportedly based on Ninth Circuit precedent. App. 6-9. The Court of Appeals dismissed as "needlessly establishe(d)" *Renton's* first step, whether the ordinance is a time, place or manner regulation. App. 9. However, the court is then quick to concede that the City's ordinance meets the test[8]. App. 10.

With respect to the second *Renton* step, the Court of Appeals held that the City was unable to establish a substantial governmental interest in prohibiting the concentration of adult entertainment businesses within one building because the City's 1977 Study was "insufficient" to justify that specific regulatory detail. App. 11. Even though the 1977 Study has been found sufficient to support numerous regulations in other jurisdictions which relied on it (See, e.g., footnote 1, *supra*), the Ninth Circuit found that it was insufficient to support the authoring

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[7] Whether the City's ordinance allows for "reasonable alternative avenues of communication" is not before the Court. This issue was rendered moot when the trial court granted plaintiffs' motion for summary judgment. App. 54.

[8] Cf., *Lim v. City of Long Beach*, 217 F.3d 1050, 1053 (9th Cir. 2000), where the same panel in a case argued and submitted on the same day as this one did not feel compelled to deconstruct this Court's straightforward *Renton* analysis in order to reinterpret it: "Where an ordinance does not ban adult businesses outright, but limits the areas of a city in which they may operate, it is considered a content-neutral time, place, and manner restriction."

City's regulation because it "was not directed at determining the impact of individual adult business units." (10743.) The court therefore found it unreasonable for the City to infer that the combination of sexually explicit businesses at one location " 'would produce harmful secondary effects of the type asserted' in the 1977 Study." App. 12.

The Ninth Circuit's approach directly conflicts with *Renton*. The Court of Appeals, as it did before, has invalidated a zoning regulation because the City's "ordinance was enacted without the benefit of studies specifically relating to 'the particular problems or needs of [Los Angeles],' the city's justifications for the ordinance were 'conclusionary and speculative.' 748 F.2d at 537." *Renton, supra*, 574 U.S. at 50. The Ninth Circuit now requires the City to establish not only that there are adverse secondary effects resulting from the concentration of adult entertainment businesses; it also requires the City to *prove* that placing two or more adult businesses in a single building *specifically* contributes to the identified negative secondary effects. In practice, and in reason, this approach effectively precludes all adult business zoning regulations in the Ninth Circuit, rendering *Renton* meaningless. Each individual business can avoid regulation by simply asserting that "it is not I" who is contributing to the problem.

Moreover, the Ninth Circuit's approach is illogical as it applies here. Although not readily conceded by the Court of Appeals, the 1977 Study did establish that the concentration of adult businesses produced serious secondary effects within the communities they are located,

justifying their separation from each other and from traditionally protected sensitive land uses. App. 11. Notwithstanding this evidence, the Ninth Circuit has decided that the 1977 Study is insufficient to justify a regulation which would prevent two – or even all – adult entertainment businesses in Hollywood from locating within one building. The court's approach reimposes in the Ninth Circuit the overly rigid burden of proof rejected by this Court and is contrary to the "reasonable opportunity to experiment with solutions" standard established in *Renton*.

Had the Court of Appeals below undertaken a proper *Renton* analysis, as did the court in *Mitchell*[9], for example, it should have readily decided that the City's 1977 Study provided a substantial evidentiary record from which to conclude that adult entertainment businesses *as a class* caused very serious negative secondary effects. Applying that standard, the court also should have decided that the City's regulation could be constitutionally applied to multiple adult businesses in one building to remedy those problems.

This significant conflict with this Court's *Renton* decision can only be resolved by this petition for writ of certiorari.

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[9] Discussed at pages 14-15, *supra*.

CONCLUSION

As demonstrated above, there is a direct conflict among the circuits concerning the evidentiary burden of proof necessary to justify a zoning ordinance regulating adult businesses under *Renton*. The issue is important and the conflict goes to the very essence of this Court's jurisprudence permitting municipalities to effectively regulate the adverse secondary impacts of sexually explicit businesses through zoning. Further consideration by this Court is required to resolve this significant conflict among the circuits by means of this petition for writ of certiorari.

DATED: November 16, 2000

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAMEDA BOOKS, INC., a California corporation; HIGHLAND BOOKS, INC., a California corporation, *Plaintiffs-Appellees,* v. CITY OF LOS ANGELES, *Defendant-Appellant.*	No. 98-56200 D.C. No. CV-95-07771-DDP (CTx) ORDER AMENDING OPINION AND DENYING REHEARING AND AMENDED OPINION

Appeal from the United States District Court for the Central District of California
Dean D. Pregerson, District Judge, Presiding

Argued and Submitted
February 8, 2000 – Pasadena, California

Filed July 27, 2000
Amended August 28, 2000

Before: Robert Boochever, Michael Daly Hawkins, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Hawkins

COUNSEL

Michael L. Klekner, The City of Los Angeles, Los Angeles, California, for the defendant-appellant.

G. Randall Garrou, Weston, Garrou & DeWitt, Los Angeles, California, for the plaintiffs-appellees.

Robert W. Hargreaves, Best Best & Krieger, Rancho Mirage, California, for amicus curiae Sixty-Five (65) California Cities, in support of the appellant.

G. Randall Garrou, Weston, Garrou & DeWitt, Los Angeles, California, for amicus curiae Center for Fair Public Policy in support of the appellees.

Richard J. Hertzberg, Phoenix, Arizona, for amicus curiae L.J. Concepts, Inc., in support of the appellees.

ORDER

The Opinion filed on July 27, 2000, slip op. 8935, and appearing at 2000 WL 1047892 (9th Cir. July 27, 2000), is amended as follows:

At Slip op. 8939, in the first line below "BACKGROUND" – substitute "On July 28, 1978" for "On July 28, 1977"

At slip op. 8953, in the last sentence of the penultimate paragraph – substitute "Therefore, any inference that the statute could have an ameliorating impact on the identified harmful secondary effects would be unreasonable under both *Tollis* and *Acorn*." for "Therefore, any inference that, absent the statute, the harmful affects [sic] would be ameliorated would be unreasonable under both *Tollis* and *Acorn*."

With these amendments, the panel has voted to deny Plaintiffs-Appellees' petition for rehearing. Petition DENIED.

OPINION

HAWKINS, Circuit Judge:

We must determine whether the district court was correct in concluding as a matter of law that ordinances of the City of Los Angeles (the "City" or "Los Angeles") prohibiting the operation of adult businesses that both sell adult products and contain facilities for the viewing of adult movies or videos were inadequately supported by evidence of adverse impact so as to violate the First Amendment. We affirm.

I.

BACKGROUND

On July 28, 1978, the City enacted Ordinance No. 151,294, adding section 12.70 to the Los Angeles Municipal Code ("L.A.M.C."), which prohibits the "establishment, substantial enlargement or transfer of ownership or control" of an adult business establishment "within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park within the City of Los Angeles." L.A.M.C. § 12.70(C) (1977). The regulation was enacted after a comprehensive study, conducted in 1977 and assessing the impact of concentrations of adult businesses on surrounding areas, found a positive correlation between concentrations of adult businesses and increases in prostitution, robberies, assaults, and thefts.[1]

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[1] The Study also stated there was "some basis to conclude" that property values in the study areas increased to a lesser degree than in the control areas. It concluded, however, that the

In 1983, the City amended section 12.70(C), with the passage of Ordinance No. 157,538 to prohibit so-called "multiple use" adult businesses. Section 12.70(C), as amended, additionally prohibits "the establishment or maintenance of more than one adult entertainment establishment in the same building, structure, or portion thereof. . . . " L.A.M.C. § 12.70(C). The 1983 amendments also modified the existing definition of an "adult entertainment business" to specifically categorize *inter alia* an "adult bookstore" and an "adult arcade" as "separate adult entertainment businesses even if operated in conjunction with another adult entertainment business at the same establishment." L.A.M.C. § 12.70(B)(17).

Appellees, Alameda Books, Inc. ("Alameda") and Highland Books, Inc. ("Highland"), are two adult businesses operating within the city limits of Los Angeles. Neither is located within 1,000 feet of another adult business nor within 500 feet of any religious institution, public park, or school. Each business occupies less than 3,000 square feet. Both Alameda and Highland rent and sell sexually oriented products, including videotapes. Additionally, both businesses provide booths where patrons can view videotapes for a fee. The booths are of two types. In the Preview Booths customers can view videotapes that are for rent or sale within the store. The Multichannel Viewing Booths allow customers to choose from dozens of pre-selected videotape selections.

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concentration of adult businesses was not the primary cause of this phenomenon.

The video booths and the retail sales and rental of tapes of both stores are located in the same commercial space within a single building. There are no distinctions, physical or otherwise, between the different operations within each of the stores. Each has only one entrance door, and one employee supervises the entire location. Additionally, the appellees are the sole owners of each of their stores, and revenue from the video booths and the sales and rentals is not distinguished in any way, other than for internal accounting purposes. Notwithstanding these facts, it is uncontested that both businesses have operations that fall within the definitions of "adult bookstore" and "adult arcade" under section 12.70(B)(17) of the L.A.M.C.

On March 15, 1995, a City building inspector found that Alameda was operating both an adult bookstore and an adult arcade in the same building and was therefore in violation of section 12.70(C). Alameda and Highland then joined as plaintiffs and sued for declaratory and injunctive relief under 42 U.S.C. § 1983 to prevent enforcement of the ordinance. Both the City and the appellees filed cross-motions for summary judgment.

The district court initially denied both motions on the First Amendment issues, concluding that there was a "genuine issue of fact as to whether plaintiffs' bookstore and arcade components were separate businesses, like those whose concentration was examined by the 1977 studies." Alameda and Highland then filed a motion for reconsideration of the First Amendment portion of the district court's order denying summary judgment. On June 2, 1998, the court vacated its prior order and granted summary judgment for Alameda and Highland and

issued a permanent injunction enjoining the enforcement of the ordinance against the appellees. The City then appealed to this court. We have jurisdiction under 28 U.S.C. § 1291.

II.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *See, e.g., Robi v. Reed*, 173 F.3d 736, 739 (9th Cir.), *cert. denied*, 120 S. Ct. 375 (1999). We must determine, viewing the evidence in the light most favorable to the appellants, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *See, e.g., Berry v. Valence Tech., Inc.*, 175 F.3d 699, 703 (9th Cir.), *cert. denied*, 120 S. Ct. 528 (1999). We do not weigh the evidence or determine the truth of the matter; rather, we only decide whether there is a genuine issue of material fact for trial. *See Colacurcio v. City of Kent*, 163 F.3d 545, 549 (9th Cir. 1998).

The constitutionality of a regulation is a question of law that is reviewed de novo. *See Gonzalez v. Metropolitan Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1553 (2000).

III.

ANALYSIS

A. *Renton* Analysis

Our inquiry, though not the result, is somewhat complicated by two varying formulations of the test governing our analysis. In *Tollis v. San Bernardino County*, 827

F.2d 1329 (9th Cir. 1987), we were presented with the opportunity to apply the then-recent decision of the Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), which analyzed the constitutionality of city zoning regulations that prohibited adult theaters from being located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. *Tollis* held that *Renton* had established a "three-step inquiry" to determine the constitutionality of such ordinances. *Tollis*, 827 F.2d at 1332. A reviewing court must inquire: (1) whether the ordinance is a time, place, manner regulation; (2) if so, whether it is content-neutral or content-based; and (3) if content-neutral, whether it is "designed to serve a substantial governmental interest and do[es] not unreasonably limit alternative avenues of communication." *Id.* (internal quotations omitted); *see also Renton*, 475 U.S. at 47.

More recently, we formulated this test in a slightly different and (we believe) more coherent manner. In *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1999), we looked to the Supreme Court's opinion in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), to determine the constitutionality of the city's ordinance requiring nude dancers to perform at least ten feet from patrons.[2] Citing

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[2] *Colacurcio* involved expressive conduct, which is not at issue here. The Supreme Court, however, has noted that the test for regulations affecting expressive conduct is nearly identical to the test for time, place, or manner regulations affecting protected speech. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) ("[V]alidating a regulation of expressive conduct . . . in the last analysis is little, if any, different from the standard applied to time, place or manner

to *Ward*, we held that "[m]unicipalities may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are: (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information." *Colacurcio*, 163 F.3d at 551.

The differences between the *Tollis* and *Colacurcio* test are slight, yet obvious. *Colacurcio* eliminates *Tollis*'s first step – determining whether the ordinance is a time, place or manner regulation – and merely splits the two inquiries of *Tollis*'s third step – narrow tailoring to serve a significant government interest and ample alternative means of communication – into two separate steps.[3]

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restrictions."). Consequently, in *Colacurcio* we looked to *Ward*, a case involving restrictions impacting on speech per se (and not expressive conduct), for guidance. *See also Colacurcio*, 163 F.3d at 551, n. 4 (quoting *Clark* and noting that the Ninth Circuit frequently cites both the test for expressive conduct and that for time, place or manner regulations when analyzing regulations of adult entertainment).

[3] We note that in *Colacurcio* we held that the regulation must serve a "significant" government interest, *see* 163 F.3d at 551, while in *Tollis* we held that the government interest must be "substantial." 827 F.2d at 1332. We accord no substantive difference to these terms as they are used in the adult zoning context. Indeed, the language in *Tollis* was taken from our decision in *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1334-35 (9th Cir. 1986), which was cited with approval in *Colacurcio*. *See* 163 F.3d at 551 n. 4. Additionally, *Tollis* did not explicitly include the narrow tailoring requirement as part of its third step. That *Tollis* requires the regulation must be "narrowly tailored" to serve a substantial government interest is, however, clear from the opinion. *See Tollis*, 827 F.2d at 1333 (holding that

Clearly, there is no substantive difference between *Tollis* and *Colacurcio*, and a given result under one necessarily dictates an identical outcome under the other. Moreover, the jurisprudence governing each test is fully applicable to both.

Colacurcio, however, better formulates the test. First, the third step of *Tollis* incorporates two distinct inquiries, which are more properly separated for both conceptual and practical reasons in *Colacurcio*. Additionally, *Tollis* needlessly establishes the time, place or manner inquiry as a distinct step. Time, place or manner is an objective description of a regulation (or one proffered by the enacting legislative body); it is not a talismanic incantation affording the ordinance a lesser degree of judicial scrutiny. To the contrary, the question the courts must ask is whether the time, place or manner regulation is content-neutral. The Supreme Court recognized as much in *Ward* when it excluded a time, place or manner analysis, which it had included in *Renton*, from its discussion. For the sake of clarity and consistency in future opinions, and because we believe the *Colacurcio* formulation is more aptly constructed, we will utilize it here.

As a preliminary matter, we note that section 12.70(C) comes under the general category of a time, place, or manner regulation. *Renton* held that zoning regulations governing adult businesses are generally considered time, place or manner regulations. *See Renton*, 475

"[t]he County has thus failed to show that the ordinance, as interpreted by the County . . . is sufficiently 'narrowly tailored' to affect only that category of theatres shown to produce the unwanted secondary effects") (*quoting Renton*, 475 U.S. at 51).

U.S. at 46. Moreover, section 12.70(C) does not ban adult entertainment establishments altogether. *See Tollis*, 827 F.2d at 1332 (holding that ordinance before the court was "obviously" a time, place, or manner regulation "as it [did] not ban adult theaters altogether").

Under *Colacurcio*'s first step (i.e. *Tollis*'s second step), a regulation is content-neutral if the ordinance is "aimed to control secondary effects resulting from the protected expression rather than at inhibiting the protected expression itself." *Tollis*, 827 F.2d at 1332 (internal quotation omitted) (citing *Renton*, 475 U.S. at 48-49); *see also Renton*, 475 U.S. at 48 (regulation is content-neutral if it is "justified without reference to the content of the regulated speech").[4] We need not decide whether the contested regulation is content-neutral, for even if it were, it fails to satisfy the second step in the *Colacurcio* analysis (i.e. the third step of *Tollis*).[5]

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[4] As discussed above, because the *Tollis* and *Colacurcio* tests are identical, the standards applied to one may be applied to another.

[5] The district court conducted its analysis using a slightly different approach that, though perfectly reasonable, somewhat conflated the inquiries under *Tollis*'s second and third steps. We need not specifically endorse this analysis, as section 12.70(C) fails to satisfy the second step of *Colacurcio* (i.e. the third step of *Tollis*.) *See Cline v. The Indus. Maintenance Eng'g and Contract Co.*, 200 F.3d 1223, 1229 (9th Cir. 2000) ("Summary judgment may be affirmed on any ground supported in the record, including reasons not relied upon by the district court.").

B. *Colacurcio*'s Second Step: Substantial Government Interest

The City has a "substantial government interest" in reducing crime in its neighborhoods. *See Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976) ("[T]he city's interest in attempting to preserve the quality of urban life in [sic] one that must be accorded high respect."). At issue is whether the regulations are "designed to serve" this interest. We hold they are not.

The only evidence relied upon by Los Angeles to justify the 1983 amendments to section 12.70(C) is the 1977 study (the "Study"), which was used as the basis for the enactment of the original regulations. This is insufficient.

The Study looked at the concentration of four types of adult businesses: massage parlors, "bookstores/arcades," theaters, and adult motels. It assessed five areas where these businesses were concentrated and compared crime rates in these areas with rates in nearby "control" areas. Additionally, the Study measured changes in assessed land values from 1970 to 1976 in the study and control areas. As noted, the Study concluded that there was a positive correlation between concentrations of these adult businesses and increases in prostitution, robberies, assaults, and thefts.

The district court found that the Study addressed the secondary impact not of single adult business establishments, but of concentrations of separate, individual adult businesses, and that appellees' businesses are not separate in the sense that the businesses surveyed in the Study were separate establishments. As the Study was

the only evidence to justify the 1983 amendments, the district court held that summary judgment was appropriate because the City could not meet its burden to show that it "relied on evidence supporting a reasonable belief that combination businesses . . . produced harmful secondary effects of the type asserted" in the 1977 Study. We agree.[6]

The Study treated a bookstore/arcade combination as a single business or unit of adult entertainment whose secondary effects arise from its proximity to several other units of adult entertainment. It did not analyze an individual bookstore/arcade combination as a concentration of adult businesses.

Additionally, the Study was not directed at determining the impact of individual adult entertainment business units. Rather, its purpose was to ascertain the impact of a concentration of such business units in small geographic areas. Therefore, by categorizing certain businesses as "bookstore/arcades," the Study determined not what the impact of a "bookstore/arcade" was on the surrounding

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[6] It is well-established that the burden of proof is on the City to justify a regulation which burdens the freedom of expression. *See, e.g., Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 n. 5 (1984) ("[I]t is common to place the burden upon the Government to justify impingements on First Amendment interests"); *Lim v. City of Long Beach*, 2000 WL 821295 at *2 (9th Cir. Jun. 27, 2000) (noting that it is "clear" that the burden of proving alternative avenues of communication rests on the government); *Tollis*, 827 F.2d at 1333 ("The County *must show* that in the enacting particular limitations . . . it relied upon evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects." (emphasis added)).

area, but the impact of a bookstore/arcade as an individual business entity that was part of a concentration consisting of multiple adult business establishments. As such, the Study did not identify any harmful secondary effects resulting from bookstore/arcade combinations as individual business units.

The City does not argue that the Study explicitly considered adult arcades and bookstores as separate business entities, an argument that would support its contention that a combination bookstore/arcade as an individual business entity is a "concentration" of adult businesses. Nor does it dispute that the concentration of adult businesses was the primary cause of the harmful secondary effects identified in the Study. Indeed, the pertinent findings of the Study focus solely on the concentration of separate adult business entities. Rather, the City asserts that the Study provides enough of a basis to allow it to constitutionally proscribe combination adult businesses under section 12.70(C) of L.A.M.C. The City's arguments fail.

In examining the City's regulation of adult businesses, we are mindful of numerous admonitions from the Supreme Court about the proper role of the judiciary in scrutinizing legislative judgments. In *American Mini Theatres*, the Supreme Court recognized that the courts are not to second-guess legislative solutions. In upholding the validity of a zoning regulation prohibiting adult entertainment establishments within 1,000 feet of one another, the Court stated: "It is not our function to appraise the wisdom of [the City Council's] decision. . . . Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious

problems." 427 U.S. at 71; *see also Renton*, 475 U.S. at 52 (quoting *American Mini Theatres*); *United States v. Albertini*, 472 U.S. 675, 689 (1985) (validity of a content-neutral time, place, or manner regulation does not "turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests"); *Jones Intercable, Inc. v. City of Chula Vista*, 80 F.3d 320, 326 (9th Cir. 1996) (courts "accord substantial deference to the predictive judgments" of legislative bodies when analyzing content-neutral regulations that burden speech) (quoting *Turner Broad. Sys., Inc. v. FCC ("Turner I")*, 512 U.S. 622, 665 (1994)).

This deference to legislative decision making is not unbounded. In *Tollis*, we established a predicate evidentiary requirement that must be met before we will defer to the judgments of legislative bodies enacting content-neutral time, place, or manner regulations that incidentally burden speech. *Tollis* considered an injunction against the enforcement of a county zoning ordinance prohibiting adult-oriented businesses from locating within 1,000 feet of various other establishments (e.g., schools, churches, etc.). The county had interpreted the ordinance such that a single showing of an adult movie would make a theater an "adult-oriented business" for the purposes of the ordinance. *See* 827 F.2d at 1331.

In affirming the injunction, we held that under *Renton*, the county "must show that in enacting the particular limitations . . . *it relied* upon evidence permitting a reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects." *Id.* at 1333 (emphasis added). We then found that the county

had presented no evidence that a single showing of an adult film would have any of the harmful secondary effects on the community that the county had identified as the basis for the regulation. *Id.*

Like the county in *Tollis*, Los Angeles has presented no evidence that a combination adult bookstore/arcade produces any of the harmful secondary effects identified in the Study. As the above discussion indicates, the evidence the City has "relied" upon – the 1977 Study – contains no findings that an individual combination bookstore/arcade produces any of the increased crime the Study found resulting from a concentration of adult businesses. Therefore, it is unreasonable for the City to infer that absent its regulations, a bookstore/arcade combination would have harmful secondary effects. *See also Acorn Invs., Inc. v. City of Seattle*, 887 F.2d 219, 222 (9th Cir. 1989) (holding unconstitutional under *Renton* a city licensing fee for specific types of adult theaters because the City had "failed to prove" that these theaters were responsible for fostering the alleged secondary effects – criminal activity – that were given as justification for the licensing fee); *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 211 (1997) (holding that in reviewing content-neutral regulations burdening speech under an intermediate scrutiny standard, the question for the courts "is whether the legislative conclusion was reasonable and supported by *substantial evidence in the record before [the legislative body]*") (emphasis added).

The City argues that the original intent of section 12.70(C), adopted pursuant to the Study, included a ban on more than one adult business in a building. This argument is unpersuasive. Whether the prohibition

against combination businesses was intended to be included in the original ordinance is largely immaterial to the question of whether the Study adequately justifies the current regulations.

Nor could Los Angeles have reasonably concluded that the expansion of an adult bookstore to include an adult arcade would increase the frequency and regularity of activity for the business and heighten the probability that such activity would produce the harmful secondary effects identified in the Study. Such reasoning would justify the prohibition of the simple expansion of a lone adult bookstore in order to accommodate a larger variety of adult products (which, ostensibly, would attract more patrons), and not for the purpose of installing an arcade. Such a prohibition, however, is clearly not supported by the Study.

The Supreme Court, as well as this circuit, have held that a legislative body may rely on studies, conducted by other cities and counties, linking a concentration of adult businesses to increased crime to justify its own regulation of adult businesses. In *Renton*, the Court held that the city

> was entitled to rely on the experiences of . . . other cities . . . in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

475 U.S. at 51-52; *see also Colacurcio*, 163 F.3d at 551 ("In evaluating the secondary effects of adult entertainment,

the city is also permitted to rely on experiences of other jurisdictions.").

Los Angeles relies on this ability to use foreign studies for the proposition that the 1983 amendments to section 12.70(C) are entitled to similar deference. If foreign studies can be used to justify the regulation of adult business, then surely, the City argues, its regulations, based upon its own study, are entitled to deference. Again, this argument misses the mark. That a legislative body may rely on foreign studies to establish its interest in a regulation does not relieve that entity from the obligation of demonstrating that the study must be " 'reasonably believed to be relevant to the problem that the city addresses.' " *Colacurcio*, 163 F.3d at 551 (quoting *Renton*, 475 U.S. at 51-52). As shown, the Study fails this test.[7]

The City also points to decisions of our sister circuits in support of its argument that the Study provides the necessary evidentiary basis to satisfy *Renton*'s third

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[7] In this regard, the Supreme Court's recent opinion in *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000), is of little aid to Los Angeles. In upholding the City of Erie's ban on nude dancing, the Court stated that "Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres*" with respect to the secondary effects of adult entertainment establishments because the nude dancing that claimed protection was "of the same character as the adult entertainment at issue" in the two cases. *Id.* at 1395. For the purposes of the secondary effects identified in the Los Angeles Study, a solitary bookstore/arcade combination is hardly of the "same character" as a grouping of multiple adult business establishments in a given geographical area.

prong. The cases cited, however, are either directly contrary to established Ninth Circuit precedent, or merely restate the requirement that a legislative body's reliance upon the evidence it cites must be reasonable. *See, e.g., Renton*, 475 U.S. at 51-52.

In *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994), the Eighth Circuit upheld the constitutionality of an adult business zoning ordinance, as applied to adult bookstores, that prohibited on-premises viewing of adult movies or videotapes. The court noted that Rochester relied on foreign studies and held that under *Renton*,

> Rochester need not prove that [plaintiffs' business] would likely have the exact same adverse effects on its surroundings as the adult businesses studied by [other cities]. So long as Ordinance No. 2590 affects only categories of businesses reasonably believed to produce at least some of the unwanted secondary effects, Rochester must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.

Id. at 1418 (internal quotation omitted). While this application of *Renton* may be somewhat more flexible than the standard we announced in *Tollis*, Los Angeles's regulations would still fail under the Eighth Circuit's analysis. The Los Angeles Study examined concentrations of multiple adult business establishments; it did not study the impact of individual establishments in any form, whether as solitary units or as part of the concentration of businesses. Under the Eighth Circuit's analysis, then, Los Angeles could not have reasonably believed, based on the

Study, that an individual adult business could produce some of the secondary effects resulting from a concentration of businesses.

In *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3rd Cir. 1993), the Third Circuit upheld a Delaware statute setting closing hours for adult businesses and prohibiting closed viewing booths. The court cited to *Renton* and held that the state "need only show that adult entertainment establishments as a class cause the unwanted secondary effects the statute regulates." *Id.* at 138. This statement and the Third Circuit's citation to *Renton* pertain to whether the regulation is narrowly tailored, not whether the evidence produced can reasonably justify the regulation as serving a substantial government interest. Narrow tailoring of the Los Angeles ordinance is a question we need not address.

Moreover, if the Third Circuit's holding were applied to the issue before us, we would have to reject its analysis. Merely requiring that a legislative body show that adult establishments as a class cause the secondary effects the regulation is aimed at preventing could easily fall far short of our requirement in *Tollis* that a legislative body "must show that in enacting the particular limitations . . . it *relied upon* evidence permitting the reasonable inference that, absent such limitations, the adult [businesses] would have harmful secondary effects." 827 F.2d at 1333 (emphasis added).

Finally, the City cites *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), a case in which the Fourth Circuit examined a state law almost identical to the Los Angeles ordinance. *Hart* held constitutional a

North Carolina statute prohibiting two or more "adult establishments" from occupying a single building. Adult bookstores and adult arcades were defined as separate establishments under the statute.

The Fourth Circuit found that the statute, "on its face," was a "permissible regulation of the external costs of adult establishments that is unrelated to the overall suppression of any protected materials offered by them for public consumption." *Id.* at 829. In concluding that the statute served a substantial government interest, the court noted that no formal legislative history existed for the statute, but held that a legislative determination that the dispersal of the marketing activities of the businesses might ameliorate adverse secondary effects "cannot be thought unreasonable." *Id.* at 828.

Hart was decided before *Renton*; therefore, there may be some doubt that it would survive scrutiny under the current Supreme Court's precedent. We are sure, however, that the case would not pass muster under our decisions in *Tollis* and *Acorn*. In *Hart*, there was no evidence from foreign studies to support the statute. What evidence the court did cite as being produced by the state – a report on health conditions inside the video viewing booths that the bill's sponsor read to a legislative committee, *see id.* at 828 n.9 – would not meet *Tollis*'s reasonable inference requirement.

Prohibiting arcades and adult bookstores from being located in the same building would not prevent the type of unhealthy conditions in the booths that the Fourth Circuit cited as the only evidence produced by North Carolina to justify its statute. There is nothing in the case

to indicate that the same type of behavior that occurs in viewing booths in combination bookstore/arcades would not occur in an establishment that only furnishes an arcade. Therefore, any inference that the statute could have an ameliorating impact on the identified harmful secondary effects would be unreasonable under both *Tollis* and *Acorn*.

The decision of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., et al., Plaintiffs, v. CITY OF LOS ANGELES, Defendant.	Case No. CV 95-7771 DDP (CTx) ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION OF FIRST AMENDMENT PORTION OF SUMMARY JUDGMENT ORDER ENTERED JANUARY 12, 1998 DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF EQUAL PROTECTION PORTION OF SUMMARY JUDGMENT ORDER GRANTING PLAINTIFFS' MOTION TO ALTER OR AMEND VAGUENESS PORTION OF SUMMARY JUDGMENT ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed May 28, 1998)

This matter comes before the Court on the plaintiffs' motions to reconsider the First Amendment and Equal

Protection portions of the Court's January 12, 1998 Order granting in part the defendant's summary judgment motion, and denying the plaintiffs' summary judgment motion ("Summary Judgment Order"). The Court heard oral argument on April 13, 1998. Having considered the parties' contentions in light of the applicable legal authorities, the Court grants the plaintiffs' motion for reconsideration of the First Amendment portion of the Summary Judgment Order, denies the plaintiffs' motion for reconsideration of the Equal Protection portion of the Summary Judgment Order, and grants the plaintiffs' motion to alter or amend the vagueness portion of the Summary Judgment Order.

I. Introduction

The issue in this case is whether the City of Los Angeles (the "City") violates the First Amendment by enforcing a zoning ordinance that defines certain activities as "adult entertainment businesses" and prohibits the operation of more than one such business in the same building. Non-obscene adult entertainment is protected by the First Amendment. Local governments may impose special zoning restrictions on adult entertainment businesses without violating the First Amendment, provided that such restrictions are directed at harmful "secondary effects" of such businesses, and not at suppressing the content of adult entertainment. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986). The plaintiffs contend that at the time of the ordinance's enactment, the City did not have a reasonable basis to believe that multiple adult entertainment uses within a single business created harmful secondary effects, and that therefore a

multiple use restriction applicable only to adult entertainment businesses violates the First Amendment. The City contends that the 1977 Studies presented to the City Council at the time of enactment demonstrated that concentrations of adult entertainment businesses have harmful secondary effects, and that these studies support a restriction on concentrations of multiple uses within one business. The Court finds that while the studies addressed concentrations of separate adult entertainment businesses in an urban area, the studies did not treat the activities conducted by the plaintiffs – video rental and on-premises video viewing – as separate businesses. The Court therefore finds that there is no genuine issue of fact whether the multiple use ordinance was justified by a showing of harmful secondary effects at the time of its enactment.

II. Background

The plaintiffs are corporations that operate adult bookstores in the City of Los Angeles. The bookstores are Alameda Books and Highland Books. The bookstores offer "non-obscene sexually-oriented" videotapes for sale and rental.[1] (Declaration of Steven D. Wiener, President of Highland Books, Inc. and Alameda Books, Inc. ("Wiener Decl.") ¶ 5.)

[1] The parties do not dispute the characterization of the material offered by the bookstores as non-obscene. The Court finds, therefore, that non-protected obscene speech is not at issue in this case.

In addition, the bookstores include a number of booths in which customers, for a small fee, can preview videotapes offered for sale or rental in the store. (*Id.* ¶ 13.) The stores also include a number of video booths which provide customers with an average of sixty different channels of videos. For a per-minute fee, customers may browse among the channels until a timer stops the machine. (*Id.* ¶ 12.)

The plaintiffs challenge the validity of a portion of the Los Angeles Municipal Code ("LAMC") that prohibits the maintenance of more than one adult entertainment business in the same building.[2] The multiple use provision, LAMC § 12.70(C), is part of an adult entertainment zoning ordinance mandating a minimum distance between adult entertainment businesses.

In 1978, the City enacted LAMC § 12.70, prohibiting adult entertainment businesses from being established, enlarged or subject to transfer of ownership within 500 feet of churches, schools, or parks, or within 1,000 feet of other adult entertainment businesses. (*See* Plaintiffs' RJN Ex. A.) In 1984, the City amended LAMC § 12.70 to prohibit the maintenance of more than one adult entertainment business in the same building or structure. LAMC § 12.70(C). (*See* Plaintiffs' RJN Ex. C.)

[2] The Court takes judicial notice of the adult entertainment zoning ordinance, Los Angeles Municipal Code ("LAMC") § 12.70. (Plaintiffs' Request for Judicial Notice ("RJN") Ex. G.) The Court also takes judicial notice of the acts of the Los Angeles City Council enacting and amending the adult entertainment zoning scheme. (Plaintiffs' RJN Exs. A-F.)

Under the ordinance, the component of the plaintiffs' businesses that rents video tapes for home use is defined as an "Adult Bookstore." LAMC § 12.70(B)(2)(a). The component of the plaintiffs' businesses in which customers may view tapes on the premises is defined as an "Adult Arcade." LAMC § 12.70(B)(1). The 1983 multiple use ordinance defines an "Adult Entertainment Business" as an

> Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theatre, Adult Theatre, Massage Parlor, or Sexual Encounter Establishment, as defined herein, and each shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment.

LAMC § 12.70(B)(17).

The City has not enforced the multiple use ordinance since its enactment in 1983. The City was preliminarily enjoined from enforcing the ordinance against several bookstores in *Topanga Press, Inc., et al v. City of Los Angeles*, CV 88-7838 RG (SHx) (C.D. Cal. 1991), *aff'd*, 989 F.2d 1524 (9th Cir. 1993). (*See* Klekner Dec. Ex. 22 attached to Def.'s Am. Opp.) After the United States Supreme Court denied certiorari, the City settled the eight cases underlying *Topanga Press*, stipulating to a permanent injunction prohibiting enforcement of the ordinance only against the *Topanga Press* plaintiffs. (1 Defendant's RJN Ex. 1.)

In 1994, the City again threatened to enforce the ordinance. The targeted adult businesses filed two lawsuits. Preliminary injunctions issued in both cases, *Diamond v. City of Los Angeles*, CV 95-1534 AWT (C.D. Cal.

June 9, 1995) and *E.W.A.P., Inc. v. City of Los Angeles*, CV 95-1711 AWT (C.D. Cal. June 9, 1995). The City settled, again stipulating to a permanent injunction as to the businesses involved in the lawsuits. (King Decl. ¶¶ 9-10.)

In November 1995, the plaintiffs' counsel heard from the counsel in *Diamond* and *E.W.A.P.* that the City was planning to prosecute Alameda Books under the ordinance. (Complaint ¶ 40.) The plaintiffs initiated this action seeking declaratory and injunctive relief under 42 U.S.C. § 1983. On December 19, 1995, this Court issued a preliminary injunction barring enforcement of the ordinance during the pendency of this action.

The plaintiffs assert three causes of action. The first cause of action alleges that the ordinance facially violates the First Amendment free speech clause and the Fourteenth Amendment equal protection clause. The second cause of action alleges that the adult entertainment zoning scheme violates the First Amendment by failing to provide for reasonable alternative avenues of communication. The third cause of action alleges that the ordinance is vague and overbroad.

Both parties filed motions for summary adjudication of the first and third causes of action. The City filed a motion to stay or dismiss the action on abstention grounds. The Court on January 12, 1998 denied the City's motion to stay or dismiss the action. In the same Order, the Court granted the City's motion for summary adjudication of the equal protection component of the first cause of action. The Court denied the plaintiffs' motion for summary judgment in its entirety.

III. Discussion

A. Legal Standard for Reconsideration

Central District Local Rule 7.16 provides that

> [a] motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise [of] reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

A manifest showing of failure to consider material facts includes failure to consider such facts in light of the applicable law. Reconsideration is thus appropriate if the court's order "committed clear [legal] error." *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *see also, In re Cypress Semiconductor Sec. Litig.*, 836 F. Supp. 711, 713 (N.D. Cal. 1993).

B. Reconsideration of Summary Adjudication of First Amendment Issue Within First Cause of Action

1. Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that a motion for summary judgment shall be granted if the moving party establishes that there is no genuine issue as to any material fact and that the moving party is entitled

to judgment as a matter of law. Such a showing can be made by an affirmative demonstration in affidavits or declarations by a moving party who bears the burden of proof on the controverted issue at trial. In a circumstance where the non-moving party has the burden of proof at trial, summary judgment is appropriate if the non-moving party fails to come forward with any evidence which would create a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986).

The Court must look to the substantive law at issue to determine which facts are "material." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). In deciding whether a dispute is "genuine," the court must determine whether a reasonable jury could return a verdict for the non-moving party. *Id.* at 248-50, 106 S. Ct. at 2510-11. It is the moving party's burden to establish that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party, however, has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553.

The First Amendment portion of the Summary Judgment Order requires reconsideration because the Court clearly erred in determining which facts were material under the substantive law governing this case. Under First Amendment secondary effects doctrine as established in *Renton*, only facts that were before the City Council at the time of enactment are material to the issue of whether the ordinance was content-neutral and justified by a substantial government interest. Therefore, if, as

the Court found in the Summary Judgment Order, the 1977 Studies and other material submitted by the City fail to demonstrate that the content-neutral purpose of the ordinance justifies the ordinance's limitations on combination bookstore/arcades, then no facts regarding the current secondary effects of bookstore/arcades are material.

2. Reconsideration of Substantive First Amendment Standard

This case is governed by the First Amendment "secondary effects doctrine" under *Renton*. Ordinarily, the government may not apply time, place and manner restrictions based on the content of speech. *Id.*, 475 U.S. at 46-47, 106 S. Ct. at 928. Although the ordinance here targets adult-entertainment businesses based on specific definitions of adult content, such restrictions are not content-based if the predominant purpose of their enactment is to ameliorate deleterious secondary effects of such businesses. *Id.* at 48.

A content-neutral time, place and manner restriction on speech is constitutional if it furthers a substantial government interest and is narrowly tailored to affect no more speech than is essential to the furtherance of that interest. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 80, 96 S. Ct. 2440, 2457 (1976) (Powell, J., concurring) (citing *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968)). The City has the burden of proof at trial to show that in enacting the multiple use ordinance

it relied upon evidence permitting the reasonable inference that multiple uses in one business would have harmful secondary effects. *Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987). Because the City has the burden of proof on this issue, the plaintiffs' burden on summary judgment "may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence" to support the City's burden to show that the ordinance was enacted to advance a substantial government interest in achieving a content-neutral purpose. *Celotex*, 477 U.S. at 325, 106 S. Ct. at 2554.

In the adult entertainment context, the Ninth Circuit has used a three-step analysis to determine whether an ordinance is a valid time, place and manner restriction. *See Tollis*, 827 F.2d at 1332. The first step is to determine whether the ordinance bans the plaintiffs' expressive conduct altogether. If it does, it is not a "time, place and manner restriction," but rather a presumptively invalid prior restraint.[3] *Id.* The second step is to determine whether the ordinance should be analyzed as content-based or content-neutral. Where, as here, the ordinance on its face differentiates on the basis of content, the issue

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[3] Prior restraints must meet strict scrutiny. That is, they must be necessary and serve a compelling government interest. In the First Amendment adult entertainment context, the compelling interest is usually the protection of minors from material that, while not obscene for adults, would be obscene for minors. *See Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1249 (1997). Here, because the City would bear the burden to meet strict scrutiny, and because the City has not come forward with evidence to meet this burden, a conclusion that the ordinance must be analyzed as a prior restraint results in summary judgment for the plaintiffs.

is whether the predominant purpose in enacting the ordinance was to ameliorate adverse secondary effects of speech rather than to suppress speech itself. *Id.* Again, if the purpose of the ordinance is not content-neutral, it is a presumptively invalid prior restraint. If the restriction is content-neutral, the third step is to determine whether the restriction serves a substantial government interest, is narrowly tailored to serve that interest and allows for reasonable alternative avenues of communication. *Id.*; *see also Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 122 n.*, 112 S. Ct. 501, 511 n.* (noting that under *Renton* "regulations must be 'narrowly tailored' to advance the interest asserted by the State"). Although the regulation must be narrowly tailored to serve a substantial government interest, it need not be the least restrictive means of serving that interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746 (1989); *Renton*, 475 U.S. at 52, 106 S. Ct. at 931 (noting that state and local governments have broad latitude to choose means of ameliorating secondary effects).

The second and third steps are linked, in that the legislature must have a reasonable basis to believe that the restriction will ameliorate harmful secondary effects which the government has a substantial interest in reducing in order for the restriction to be found content-neutral. The Summary Judgment Order, however, found that the content-neutrality requirement of *Renton* was satisfied by the City Council's expression in the preamble of the ordinance of a content-neutral purpose to ameliorate secondary effects. (Order at 24:1-25:28.) The Summary Judgment Order reasoned that the substantial government interest prong should be examined separately, and that it

could be satisfied by evidence of conditions arising long after enactment of the ordinance. (Order at 26-38.)

Upon reconsideration, the Court concludes that this aspect of the Summary Judgment Order was clearly in error. This reasoning would allow a municipality to regulate speech based on an assertion of harmful secondary effects without any showing that such secondary effects exist. Ninth Circuit precedents following *Renton* require a greater showing that secondary effects actually exist. "The [local government] must show that in enacting the particular limitations it places upon adult theaters, it relied upon evidence permitting the reasonable inference that, absent such limitations, the adult theaters would have harmful secondary effects." *Tollis*, 827 F.2d at 1333.

The Summary Judgment Order clearly erred by extending a Ninth Circuit precedent in which an adult entertainment ordinance was invalidated because the harmful secondary effect no longer existed to support the proposition that an adult entertainment ordinance could be justified as content-neutral based on secondary effects that emerged after its enactment. *See Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989). In *Acorn*, the Ninth Circuit held that a secondary effects regulation was no longer valid because the conditions underlying the substantial government interest served by the regulation no longer existed. *Id.* at 221-22. The Summary Judgment Order extended this holding to support the proposition that a municipality could rely on post-enactment evidence to meet its burden to show that the ordinance was content-neutral and served a substantial government interest. The holding in *Acorn*, however, cannot be read to relax the burden on the government to

show content-neutrality at the time of enactment, but rather to tighten the government's burden, imposing on the government a continuing obligation to show that the restrictions serve a substantial government interest.[4]

The Summary Judgment Order determined as a matter of law that the 1977 Studies, because they considered only the secondary effects of concentrations of separate businesses, did not provide a reasonable basis for the City Council to believe that a single combined bookstore/arcade led to harmful secondary effects.

The genuine issue for trial, according to the Summary Judgment Order, was whether the plaintiffs' combined bookstore/arcades were separate businesses, and therefore created the concentration effects observed in the 1977 Studies. (Order at 38.) This conclusion is clearly erroneous, because the present separateness of the bookstore and arcade parts of the plaintiffs' businesses was not before the City Council at the time of the enactment of the multiple use ordinance in 1983. There is no dispute in this case that the only facts before the City Council at the time of enactment were the 1977 Studies and the staff reports recommending the multiple use amendment. The

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[4] Even if the Ninth Circuit were to adopt the standard in *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 336 (1997), which allows post-enactment evidence of content-neutral legislative intent, the result in the Summary Judgment Order still would be incorrect. *Phillips* stands for the proposition that the government may meet its burden to show content-neutrality with evidence that was not part of an official legislative record. *Id.* at 178-79. The material facts, however, are still limited to "a factual basis for a legislative judgment" at the time it was made. *Id.* at 178.

staff reports did not present any new evidence or studies as to the effects of combination businesses, but merely expressed the view that the 1978 ordinance contained a loophole allowing separate businesses to exist within 1000 feet of each other if they shared an exterior wall. (*See* 3 Def.'s RJN Ex. 5.) The staff reports thus did not consider the secondary effects of combination businesses such as those of the plaintiffs, which, through the 1984 multiple use amendments, were brought within the coverage of the ordinance without any showing of harmful secondary effects. Because the imposition of a secondary effects regulation of speech under such circumstances violates the First Amendment, the Summary Judgment Order erred in not granting the plaintiffs' motion for summary adjudication of this issue.

The City contends that the plaintiffs' motion for summary judgment should be denied, and its motion granted, because the undisputed legislative history of the zoning ordinance and the multiple use amendment show that the City Council relied upon evidence from which it could reasonably conclude that any concentration of adult business [sic] cause harmful secondary effects. The issue posed by the First Amendment secondary effects doctrine, however, is whether the City Council relied on evidence from which it could have reasonably concluded that this specific form of concentration, the operation of a combination adult arcade and bookstore on the same premises, creates the type of adverse secondary effects identified in the 1977 Studies. The Court concluded in the Summary Judgment Order, and concludes again upon reconsideration, that the City has not raised a genuine issue that would allow the finder of fact to conclude that

the 1977 Studies treated multiple activities within a single store as a form of concentration. The only material factual issue controlling the First Amendment claim concerns the type of conclusions the 1977 Studies can reasonably support. The absence of a genuine dispute as to this issue requires summary adjudication of the first cause of action for the plaintiffs.

The Court here reiterates its factual findings and conclusions of law with regard to the legislative history of the multiple use amendment:

The police department study, entitled "The Impact of Sex Oriented Businesses in the City of Los Angeles" compared crime and arrest statistics for the Hollywood area to citywide crime and arrest statistics during the period from 1969 to 1975. (4 Def.'s RJN Ex. 5 at 653.) The study concluded that an increase in prostitution, robberies, assaults and thefts for the Hollywood area was positively correlated with an increase in adult entertainment businesses in the area. (*Id.* at 655.) The study considered four types of adult businesses: "hard-core motels," "bookstores," "theaters," and "massage parlor/scam joints." (4 Def.'s RJN Ex. 5 at 657.)

In addition to its objective component, the police department study included letters from police officers stating their personal observations that crime had increased in Hollywood with the growth of adult entertainment businesses. (*Id.* at 662-71.) The police department study also included a section entitled "Letters from Businessmen, Clubs, Churches, Etc., Regarding Hollywood." (*Id.* at 672-828.) The letters, numbering in the hundreds, generally express opposition to the content of

adult entertainment, and urge the police department to do everything possible to shut down adult entertainment businesses.

The planning department study, entitled "Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles" concluded that the concentration of adult entertainment businesses had deleterious effects on the community. The objective portion of the planning department study selected five areas of "known concentrations of adult entertainment businesses." (*Id.* at 379.) The five "study areas" were compared to nearby "control areas" selected for their lack of adult entertainment businesses. The study measured changes in assessed value of land and improvements for properties in the study areas and control areas from 1970 to 1976. (*Id.*)

The planning department study counted four types of adult entertainment businesses for purposes of defining an area of high concentration: "massage parlors," "bookstores/arcades," "theaters," and "adult motels." (*Id.* at 380-87.) The study does not state whether the businesses classified as "bookstores/arcades" were free-standing bookstores or arcades, or combination bookstore/arcades.

The study concluded that assessed property values increased in all of the study areas from 1970 to 1976. (*Id.* at 383.) Two areas of adult entertainment concentration registered much higher increases in property values than did their control areas. (*Id.* at 383-88.) Three of the study areas registered lower rates of increase than did their

control areas. (*Id.*) The objective portion of the study concluded that

> there would seem to be some basis to conclude that the assessed value of property within the study areas containing concentrations of adult entertainment businesses have *generally* tended to increase to a lesser degree than similar areas without such concentrations. However, there would appear to be insufficient evidence to support the contention that concentrations of sex-oriented businesses have been the *primary cause* of these patterns of change in assessed valuations between 1970 and 1976.

(*Id.* at 388-89.)[5]

The planning department study also included a report from the police department on changes in the concentration of adult businesses in the entire City of Los Angeles from 1975 to 1976, updating and expanding the police department study described above, which considered only Hollywood during the period from 1969-75. (*Id.* at 414-16.) This updated police department report classified adult entertainment uses as "adult motels," "massage parlors," "bookstores/arcades," and "theaters." (*Id.* at 414.)

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[5] The planning department study also included subjective components, one of which was a mail survey of real estate agents and appraisers to determine their opinion on the impact of concentrations of adult entertainment businesses on property values. The majority of the respondents indicated their belief that adult entertainment businesses had a negative impact on property values. (*Id.* at 396-406.)

The City contends that the planning department study identified "bookstores and adult arcades as distinct adult entertainment businesses for purposes of its work." (Defendant's UF ¶ 39.) The City correctly points out that the introduction to the planning department study names arcades and bookstores separately among the adult entertainment establishments considered by the study. (*Id.*) The Court finds, however, that the body of the study, in categorizing adult businesses for purposes of determining the effects of their concentration, treats bookstore/arcade combinations as single businesses. In defining areas of concentration, the study treats bookstores/arcades as a single unit of adult entertainment whose secondary effects arise from proximity to several other units of adult entertainment. The study does not analyze bookstore/arcade combinations as concentrations of adult entertainment businesses, but rather analyzes bookstore/arcade combinations as single business whose harmful secondary effects arise from concentration with other businesses.[6]

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[6] The planning department study's inapplicability to the question of whether a single adult entertainment business has harmful secondary effects is also demonstrated by the study's method for selecting "control areas." By definition such areas were deemed not to have *concentrations* of adult businesses. Two of the five control areas, however, contained single adult businesses. (*See* 3 Def.'s RJN Ex. 5 at 380 (Hollywood Blvd. and Highland Ave. control area, Vermont Ave. and Santa Monica Blvd. control area). The City, therefore, cannot rely on the study to show harmful secondary effects of single adult entertainment businesses in the absence of concentration with other businesses.

The City contends that because many of the adult entertainment businesses in the studies were classified as "bookstores/arcades," the studies support a finding that the combination of a bookstore and arcade on the same premises creates the adverse secondary effects found in the studies. (Def.'s UF ¶ 43.) The City's argument, however, ignores the purposes and conclusions of the studies. The studies were not directed at determining the impacts of individual adult entertainment businesses. Instead, the studies were concerned with the impacts created by concentrations of numerous adult entertainment businesses in small areas. The stated purpose of the studies was to determine whether a "dispersal" zoning ordinance of the type approved in *Young* would be appropriate for Los Angeles. (*See* 3 Def.'s RJN Ex. 5 at 357.)

By categorizing certain businesses as "bookstores/arcades," and examining areas where such bookstores/arcades were found in close proximity to several other adult entertainment businesses, the studies determined not the impact of a bookstore/arcade on the surrounding area, but the impact of bookstores/arcades as part of a concentration with other adult businesses. The existence in the studies of the bookstores/arcades category does not support the City's contention that it has a substantial interest in separating bookstores from arcades. To the contrary, the fact that bookstores/arcades were studied as unitary businesses militates in favor of a finding that the studies do not demonstrate that such a combination business is a concentration leading to the adverse secondary effects demonstrated by the studies. *See Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1335 (9th Cir. 1987) (holding that city failed to establish that restriction on

proximity to a church of the city's only adult theater was justified by its substantial interest in preventing concentration of adult businesses, because one adult business could not be concentrated with itself).

The facts about the operation of the plaintiffs' businesses are undisputed. The City does not dispute that the bookstore and arcade operations take place in one "relatively small" storefront of 2500-3000 square feet, with one entrance from the street, one counter and cash register, and, during most hours, one employee monitoring the operations. (*See* Def.'s Separate Statement of Genuine Issues, filed Aug. 18, 1997, ¶¶ 5-10 (indicating that the facts regarding the operations of the stores are undisputed).) The City does not dispute the fact that "[t]he video viewing booths and retail sales of both stores occur in the same commercial space within a single building." (*Id.* ¶ 9.) The arcade booths are used to promote rentals and sales from the bookstore. (Wiener Decl. ¶¶ 13, 15.)

Based on these undisputed facts about the combined nature of the bookstores/arcades, the Court concludes that there is no genuine issue of fact as to whether the 1977 Studies dealing with concentrations of separate businesses could have been reasonably relied upon to support application of the multiple use prohibition to the plaintiffs' businesses.

The City contends that the bookstore and arcade components should be treated as separate for purposes of secondary effects analysis because the ordinance defines bookstores and arcades as separate uses. *See* LAMC § 12.70(B)(17). The City contends that the police power to zone uses of land includes the ability to define certain

activities as separate uses, even if they take place in the same business establishment. The City points to zoning regulations that define bakeries, dry cleaners, candy stores, drugstores, florists, grocery stores, butcher shops, delicatessens, automobile repair garages, and automobile services stations as separate uses, even though they may be operated in a single location. *See* LAMC § 12.13. (Def.'s Second RJN Ex. 15.)

The City asserts that "[t]he City's Zoning Code defines many businesses, *both adult and non-adult*, as being separate uses even though they may be operated at a single location." (Def.'s UF ¶ 79 (emphasis added).) The City's authority to define businesses as separate uses without reference to protected speech may not be questioned by this Court if there is any rational basis for the classification. The classification of certain adult entertainment activities as separate businesses, however, is subject to a different standard of review because the City applies these definitions only to businesses that engage in protected speech. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68, 101 S. Ct. 2176, 2182-83 (1981) (noting that standard applied to judicial review of zoning power depends on "the nature of the right assertedly threatened or violated;" where property rights are affected, rational basis review applies; where free speech rights are infringed, zoning law "must be narrowly drawn and must further a sufficiently substantial government interest"). Because the separate business definitions in LAMC § 12.70(C) apply only to adult entertainment uses, and therefore discriminate on the basis of protected speech, they are subject to a higher level of review than rational basis, even when, as here, they are treated as content-

neutral under *Renton*. Thus, unlike the bakery, grocery, and service station definitions, the adult entertainment business definitions must be narrowly tailored to serve a substantial government interest. The City may not require adult bookstores/arcades to separate their businesses without demonstrating that the conduct of these activities in the same building has the adverse secondary effects demonstrated by the 1977 Studies. The City's reliance on the zoning regulations applicable to bakeries and groceries would only be justified if the City required that all bookstore/arcade combinations be defined as separate businesses regardless of adult content. Such an across-the-board regulation would be subject only to rational basis review. But where, as here, the City applies the restriction only to bookstores/arcades that engage in protected speech, the higher standard of review must be applied. *See Christy v. City of Ann Arbor*, 824 F.2d 489, 493 (6th Cir. 1987) (holding that adult entertainment regulations under *Renton* require "more than a rational relationship . . . between the ordinance and this government interest" to justify discrimination based on protected speech).

In addition, the City points to the different treatment of bookstores and "coin-operated amusements," such as arcades, in zoning regulations other than the adult entertainment ordinance. (Def.'s UF ¶¶ 81-88; Eberhard Decl. ¶¶ 5-9.) The City points to the declaration of Franklin Eberhard, the Deputy Director of the Department of City Planning, and one of the authors of the 1977 planning department study. Eberhard declares the City has "historically regulated amusement enterprises separately from retail uses" because the two types of business involve

different types of impact on the surrounding community. (Eberhard Decl. ¶¶ 4-7.) A bookstore, as a retail operation in which the customers buy goods for consumption off-site, has a different impact in the form of "noise, hours of operation, parking and loitering," than does a video arcade which provides on-site public entertainment. (*Id.*)

Eberhard's declaration would be dispositive if the question were whether the City had a rational basis for an across-the-board regulation separating all bookstores from all video arcades. The City's police power clearly encompasses regulations meant to reduce noise, parking and loitering. The multiple use ordinance at issue here, however, applies to a set of bookstores/arcades defined by their exercise of protected speech. As discussed above, in order to single out businesses based on speech without violating the First Amendment, the City must demonstrate that the adult bookstore/arcade combination produces adverse secondary effects that would not be produced by a non-adult bookstore/arcade combination. *See Schad*, 452 U.S. at 73-74, 101 S. Ct. at 2185 (holding that municipality failed to demonstrate that live entertainment restricted by ordinance would produce secondary effects that would not also be produced by other, non-restricted commercial activity).

In addition, Eberhard makes the more general assertion that he has "had the opportunity to study the effects of the provision of more than one type of business at a single location" and that in his experience "a location that only has one business does not have as many impacts on the surrounding community compared to a location with more than one business." (Eberhard Decl. ¶ 10.) While Eberhard's declaration might be sufficient to defend an

ordinance that prohibited all multiple uses, it is irrelevant to the issue of whether an ordinance that prohibits multiple uses based on content violates the First Amendment. The argument that more than one business in a location has harmful secondary effects does not justify prohibiting multiple uses only for adult entertainment business and not for other types of businesses. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31, 113 S. Ct. 1505, 1517 (1993) (rejecting application of secondary effects doctrine to ban on use of newsracks to dispense commercial handbills because city made no showing that secondary effects were unique to commercial newsracks and not also caused by newspaper racks which were not regulated); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225, 110 S. Ct. 596, 604 (1990) (noting that where generally applied licensing scheme is more onerous with respect to sexually oriented businesses than with respect to the majority of other businesses, First Amendment rights are implicated).

Even if the plaintiffs' operations are considered single businesses, the City contends that a finding of secondary effects from concentration of adult businesses should be applied broadly to include concentrations of activities within a single business. The only circuit court holding on multiple use adult entertainment regulations supports the City's contention. In *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), the Fourth Circuit upheld an ordinance similar to the one at issue here. The ordinance defined an "adult establishment" as any adult bookstore, adult motion picture theater, adult mini motion picture theater, or massage business, and prohibited the operation of more than one establishment in one building. *Id.* at 823. The only evidence offered to show the secondary

effect of multiple uses was a report from the county health department on the unsanitary conditions found on a visit to five adult arcades. *Id.* at 829 n.9. The Fourth Circuit held that the health department report supported regulation of the secondary impact of adult arcades by prohibiting their operation in conjunction with another adult entertainment business.

Hart Book Stores, decided seven years before *Renton,* is inconsistent with controlling Ninth Circuit authority decided after *Renton.* The Ninth Circuit has required local governments to justify secondary effects regulations by showing that the conduct regulated actually produces the secondary effects that the government invokes to justify the regulation. *Acorn,* 887 F.2d at 224. If, as here, the City justifies the regulation based on secondary effects produced by concentration of businesses, it must demonstrate that the conduct restricted relates to concentration. *Id.* It may not point to other secondary effects, such as unsanitary conditions within the businesses, that have nothing to do with the concentration of such businesses within a given area. The Court respectfully concludes that the Fourth Circuit in *Hart Book Stores* erred by treating testimony regarding unsanitary conditions inside a video arcade as related to secondary effects of concentrations of adult entertainment businesses.

The City is correct in asserting that this case is like *Hart Book Stores.* There, as here, the government failed to demonstrate that the combination of adult entertainment businesses in a single building is the equivalent of a concentration of separate adult businesses in a neighborhood. While such a failure passed constitutional muster in *Hart Book Stores,* it is fatal under the secondary effects

doctrine as applied by the Ninth Circuit. Under *Acorn,* in order for the City to benefit from the content-neutral *Renton* analysis, the City must prove the City Council relied on evidence that would allow it to conclude that multiple uses in a single building created the specific secondary effects asserted in justifying the regulation as content-neutral. *Acorn,* 887 F.2d at 224.

The 1977 Studies on which the City relies to prove a substantial government interest demonstrate the need for a distance requirement for separate adult entertainment businesses. The planning department study did not address the secondary impact of single adult entertainment businesses. The undisputed facts regarding the nature of the plaintiffs' businesses demonstrate that they are not separate in the sense that the businesses addressed in the 1977 Studies were separate.

The evidence produced by the City does not create a genuine issue which if decided in the City's favor would meet its burden to show that the City Council relied on evidence supporting a reasonable belief that combination businesses, such as those of the plaintiffs, produced harmful secondary effects of the type asserted as the content-neutral justification for the ordinance. The Court therefore grants the plaintiffs' motion for summary adjudication of the First Amendment issue.

C. Reconsideration of the Equal Protection Issue Within the First Cause of Action

1. Selective Settlement Theory

The plaintiffs contend that the Court failed to consider material evidence in the form of conflicting declarations regarding the possible "grandfather" status of the *Topanga Press* plaintiffs, with whom the City settled, consenting to a permanent injunction against enforcement of the multiple use ordinance. The plaintiffs contend that possible grandfather status provides the only possible rational basis for the City's decision to settle with the previous plaintiffs while not settling with the instant plaintiffs. The Summary Judgment Order declined to consider the evidence regarding possible grandfather status, concluding that such evidence was not material in light of the City's broad discretion to selectively enforce its ordinances, so long as such selections have an improper basis, such as racial discrimination or the exercise of fundamental rights. (Order at 41 n.8.)

The plaintiffs contend that the Court erred in determining that the grandfather evidence was irrelevant, because, according to the plaintiffs, their claim is not based on selective enforcement, but rather on the theory that the City granted the *Topanga Press* plaintiffs a permanent "administrative exemption" from the multiple use ordinance. This exemption purportedly allows the *Topanga Press* plaintiffs to compete unfairly with the present plaintiffs, who remain bound by the ordinance.

Additionally, the plaintiffs contend that the only difference between them and the *Topanga Press* plaintiffs is that the *Topanga Press* plaintiffs exercised their right of

free speech earlier. The plaintiffs contend that the timing with which a person exercises a fundamental right cannot be a rational basis for treating that person differently under the equal protection clause.

The plaintiffs rely on *Roe v. Anderson*, 134 F.3d 1400 (9th Cir. 1998). There, the Ninth Circuit affirmed a preliminary injunction in favor of a plaintiff-class of welfare recipients who contended that a residency requirement for receipt of benefits unconstitutionally burdened the constitutional right to interstate travel. The court reasoned that the plaintiffs were likely to succeed on the merits because the equal protection clause does not allow a distinction between long-term California residents and newcomers for the purpose of setting benefit levels. *Id.* at 1404-05.

The plaintiffs here contend that their situation is analogous to that of the *Roe* plaintiffs in that the unlawful distinction in *Roe* was also based on the *timing* of the exercise of a fundamental right.

Roe does not change the equal protection principles applicable here. The distinction challenged in *Roe* was based only on the timing of the welfare applicants' arrival in California. Here, the distinction is based not only on the timing of the adult businesses' exercise of their free speech rights, but also on the entire range of factors that affect an executive decision to prosecute or settle a case. This is a more individuated distinction than the one at issue in *Roe*. While the Fourteenth Amendment prohibits local government from distinguishing between welfare applicants based solely on length of residency, it does not require the government to enforce its zoning ordinances

with absolute uniformity against different businesses, in different locations, at different times. *See Standard Bank & Trust Co. v. Village of Orland Hills*, 891 F. Supp. 446, 451 (N.D. Ill. 1995) (rejecting equal protection challenge to municipality's decision to begin enforcing previously unenforced building codes).

Put simply, the City can legitimately and constitutionally decide to settle one case because it does not think it can win, and refuse to settle another case with a similarly situated plaintiff because it does think it can win.

Because the equal protection clause does not entitle the plaintiffs to a settlement offer on the same terms as that offered to previous plaintiffs, the Court denies the motion for reconsideration as to this aspect of the equal protection claim.

2. Classification Based on Exercise of Fundamental Right

The Summary Judgment order denied both the City's and the plaintiffs' motions for summary adjudication of the equal protection issue under this theory. The Supreme Court has held that municipalities may use the content of sexually oriented entertainment businesses as the basis for placing them in a different classification from other businesses, provided that the regulation is directed at harmful secondary effects. *Young*, 427 U.S. at 71. Because the *Renton* doctrine views such regulation as directed toward secondary effects rather than toward expressive conduct, no fundamental right is implicated. Thus, the classification in question is not between businesses that engage in protected expressive conduct and those that do

not, but rather between businesses that cause harmful deleterious effects associated with adult entertainment and those that do not.

As discussed above, the Court finds that the City has failed to show a genuine issue of fact in support of the contention that the multiple use amendment serves a content-neutral purpose. Therefore, the ordinance's classification of multiple use businesses based on adult content is subject to the strict scrutiny standard applicable to classifications based on exercise of a fundamental right.

Under strict scrutiny, the classification must be necessary to promote a compelling or overriding government interest. This is the same test that applies to prior restraints of free speech under the First Amendment. As discussed above, the City's failure to demonstrate a genuine issue of fact as to content-neutral justification of the multiple use ordinance requires analysis of the ordinance as a presumptively invalid prior restraint. Because the City has not come forward with evidence at summary judgment to show that the multiple use ordinance is necessary to serve a compelling government interest, the Court must grant the plaintiffs' motion for summary judgment on the first cause of action based on both the First Amendment and Equal Protection issues.

D. Reconsideration of Vagueness Issue in Third Cause of Action

The plaintiffs contend that the Court improperly reached the merits of the vagueness challenge after concluding that the plaintiffs lacked standing to advance it. The plaintiffs argued at summary judgment that if their

facial challenge failed, they would be unable to conform their conduct with the ordinance because the definition of "adult" bookstore and arcade is too ambiguous to allow the plaintiffs to reduce their stock of adult material by an amount certain to bring them under the definition. (*See* Order at 45.)

The Court first concluded that the plaintiffs lacked standing to assert the vagueness claim because the plaintiffs conceded that the ordinance applied to their businesses as currently constituted. (Order at 45:15-27.) The Court reasoned that the plaintiffs might have standing in the future, if they reduced their percentage of adult material in an attempt to remove their businesses from the coverage of the ordinance. Until then, however, the Court concluded that the vagueness challenge was unripe.

The Court, however, then proceeded to analyze the merits of the vagueness claim and concluded, in what would have to be dicta, that the California courts had construed similar adult entertainment ordinances in such a manner as to make the definition of "substantial portion" sufficiently clear to provide notice as to which businesses are affected by the statute.

The plaintiffs correctly point out that the Supreme Court and the Ninth Circuit precedents on which the Summary Judgment Order relied did not reach the merits of the vagueness claims after concluding that the plaintiffs lacked standing. *See Young*, 427 U.S. at 61, 96 S. Ct. at 2448; *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1215 (9th Cir. 1984). The plaintiffs also point to a

recent Supreme Court opinion, in which the Court disapproved an innovation known as "hypothetical jurisdiction," whereby a court would be able to determine the merits of an action in the absence of standing, if the merits determination would have the same result as the standing determination. *Steel Co. v. Citizens for A Better Environment*, 118 S. Ct. 1003, 1012 (1998).

Under the principle announced in *Steel Co.* it was error for the Summary Judgment Order to reach the merits of the vagueness issue after determining that the plaintiffs lacked standing.

In light of the foregoing, the Court grants the motion to alter or amend the Summary Judgment Order.

The Court here reiterates its conclusion of law that the plaintiffs do not have standing to assert a vagueness claim. In *Young* and *Renton*, the Supreme Court rejected similar vagueness claims on the grounds that the plaintiffs conceded that the ordinances clearly applied to them. *Young*, 427 U.S. at 59; *Renton*, 475 U.S. at 55 n.4. The Ninth Circuit has held that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Stoianoff v. State of Montana*, 695 F.2d 1214, 1218 (9th Cir. 1983). Because there is no question as to the applicability of the ordinance to the plaintiffs, the Court rejects the vagueness challenge for lack of standing.

The plaintiffs argue that they will have standing if the preliminary injunction is lifted and they are faced with the task of bringing their businesses into compliance with the ordinance, or bringing their businesses out from under the definition of "adult entertainment." The fact

that the plaintiffs have these choices in the event that they lose this lawsuit demonstrates that their vagueness challenge under this theory is not ripe for judicial resolution.

IV. Conclusion

Because the plaintiffs correctly contend that the Summary Judgment Order improperly relaxed the burden imposed on the City to justify secondary effects regulation of speech, and misapplied the standard for summary judgment, the Court grants the motion to reconsider the First Amendment portion of the Summary Judgment Order, and grants the plaintiffs' motion for summary adjudication of this issue.

Because the Equal Protection portion of the Summary Judgment Order correctly applied the standards for selective prosecution to the claims based on the City's refusal to settle this case, the Court denies the motion for reconsideration of this portion of the Summary Judgment Order.

Because the Summary Judgment Order improperly proceeded to the merits of the vagueness challenge after determining that the plaintiffs lack standing to assert the challenge, the Court grants the motion to alter or amend the Summary Judgment Order to vacate the merits discussion.

The previous Summary Judgment Order is vacated.

Based on the findings of fact and conclusions of law detailed above, the Court grants the plaintiffs' motion for summary adjudication of the first cause of action. The

City has failed to raise a genuine issue of fact that would allow a reasonable fact finder to conclude that the multiple use ordinance is a content-neutral secondary effects regulation. The ordinance must therefore be analyzed as a presumptively invalid prior restraint. The City has offered no evidence to overcome the presumption of invalidity. The Court therefore grants summary adjudication for the plaintiffs on the first cause of action based on violation of the First and Fourteenth Amendments. The Fourteenth Amendment violation arises from the ordinance's disparate treatment of adult entertainment businesses based on the exercise of protected speech. Summary adjudication of the Fourteenth Amendment claim based on selective settlement is granted in favor of the City.

Summary adjudication of the First Amendment issue raised in the first cause of action renders moot the issues presented in the second and third causes of action. Summary adjudication of the First Amendment issue in the first cause of action also entitles the plaintiffs to a declaration of the ordinance's facial invalidity, and to a permanent injunction against its enforcement. *See Doe v. Gallinot*, 657 F.2d 1017 (9th Cir. 1981).

The Court enters final judgment for the plaintiffs in a separate order as required by Federal Rule of Civil Procedure 58, and by the same order grants a declaration and permanent injunction. An injunction against enforcement of the ordinance is within the Court's power to grant "[f]urther necessary or proper relief" to effect the judgment. 28 U.S.C. § 2202; *Gallinot*, 657 F.2d at 1025. The Court adopts the previous findings of irreparable injury, inadequacy of legal remedies, and balance of interests in

the plaintiffs' favor made in support of the preliminary injunction. (*See* Preliminary Injunction (entered Dec. 20, 1995) at 5:13-6:13.) *See also, Topanga Press*, 989 F.2d at 1528 (noting that any loss of First Amendment freedoms can constitute irreparable injury).

Dated: 5-28-98

/s/ Dean D. Pregerson
DEAN D. PREGERSON
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC., et al., Plaintiffs, v. CITY OF LOS ANGELES, Defendant.	Case No. CV 95-7771 DDP (CTx) JUDGMENT AND PERMANENT INJUNCTION (Filed May 28, 1998)

This action came on for hearing before the Court, on October 20, 1997 and April 13, 1998, on Motions for Summary Judgment. The evidence presented having been fully considered, the issues having been duly heard and a decision having been duly rendered, the Court issues the following declaration and permanent injunction.

DECLARATORY JUDGMENT

Los Angeles Municipal Code ("LAMC") § 12.70(C), to the extent it prohibits an adult business owner from conducting more than one type of adult business activity, as defined in LAMC § 12.70, as part of a single business operation within a single store, violates the free speech clause of the First Amendment and the equal protection clause of the Fourteenth Amendment of the United States Constitution in that LAMC § 12.70(C) restricts adult entertainment multiple use businesses based on the content of their speech without advancing a content-neutral government interest.

PERMANENT INJUNCTION

The Court, having found that the portions of LAMC § 12.70(C) prohibiting multiple adult entertainment uses within a single business establishment violate the First and Fourteenth Amendments, that the deprivation of constitutional rights caused by their enforcement would create irreparable injury, and that hardships created by such deprivations outweigh the hardships imposed on the defendant by inability to enforce the ordinance, ORDERS that:

Defendant City of Los Angeles, a municipal corporation, and its officers, agents, employees and attorneys, are permanently enjoined from enforcing in any criminal, civil or administrative proceeding the portions of LAMC § 12.70(C) which prohibit the establishment, operation, or maintenance of an adult bookstore and adult arcade, as defined in the ordinance, within a single building, where the bookstore and arcade are operated as part of the same business within a single store.

Dated: 5-28-98

/s/ Dean D. Pregerson
DEAN D. PREGERSON
United States District Judge

APPENDIX D

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAMEDA BOOKS, INC., A California corporation; HIGHLAND BOOKS, INC., a California corporation, Plaintiffs-Appellees, v. CITY OF LOS ANGELES, Defendant-Appellant.	No. 98-56200 DC# CV-95-07771-DDP (CTx) Central California ORDER (Filed Sept. 18, 2000)

Before: BOOCHEVER, HAWKINS, and THOMAS, Circuit Judges.

The panel has voted to deny Defendant-Appellant's petition for rehearing. Judge Boochever has recommended denial of the petition for rehearing en banc and Judges Hawkins and Thomas have voted to deny the en banc petition.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and for rehearing en banc is denied.

APPENDIX E

ORDINANCE NO. 151294

An ordinance amending Chapter 1, Article 2 of the Los Angeles Municipal Code to add Section 12.70, Adult Entertainment Zoning, in order to regulate adult entertainment businesses, as defined therein, in the City of Los Angeles.

WHEREAS, in recent years there has been a growing concern on the part of public officials and residents of the City of Los Angeles regarding the appearance of a blighting and degrading effect upon certain neighborhoods of the City from the concentration of sex-oriented, adult entertainment businesses in such neighborhoods; and

WHEREAS, based upon said concern, the Los Angeles City Council instructed the City Planning Department on January 12, 1977, to conduct a comprehensive study, with the assistance of the Police Department, City Attorney and other appropriate City agencies, to determine whether and to what extent the concentration of such adult entertainment businesses has a blighting and degrading effect upon the neighborhoods in which they are situated; and

WHEREAS, the findings of the above-mentioned study, which included testimony from public hearings, indicated that the concentration of such adult entertainment businesses tends to result in the blighting and degrading of the areas of such concentration; and

WHEREAS, in order to prevent the further concentration of such adult entertainment businesses and to protect the character of the City's neighborhoods, the City Council enacted a zoning moratorium on August 9, 1977, as an

urgency ordinance, temporarily prohibiting the establishment of an adult entertainment business, as defined therein, within 1,000 feet of another such business or within 500 feet of any church, school, park, playground or area zoned for residential use; and

WHEREAS, in order to allow sufficient time for additional study of this matter and the preparation of a permanent adult entertainment zoning ordinance, the Council directed on November 23, 1977, that said zoning moratorium remain in effect until August 11, 1978, or until such time as said permanent adult entertainment zoning ordinance has been enacted, whichever first occurs; and

WHEREAS, it is a compelling interest of the City of Los Angeles that a permanent adult entertainment zoning ordinance be enacted in order to preserve the public health, peace, safety and general welfare by regulating adult entertainment businesses in such a manner as to prevent their further concentration and the continued erosion of the character of affected neighborhoods of the City;

NOW THEREFORE:

THE PEOPLE OF THE CITY OF LOS ANGELES

DO ORDAIN AS FOLLOWS:

Section 1. Section 12.70 is hereby added to the Los Angeles Municipal Code, to read as follows:

Sec. 12.70. ADULT ENTERTAINMENT ZONING:

A. PURPOSE. It is the purpose and object of this section to establish reasonable and uniform regulations to

prevent the continued concentration of adult entertainment businesses, as defined herein, within the City of Los Angeles.

B. DEFINITIONS. For the purpose of this section, certain terms and words are defined as follows:

1. "Adult Arcade" – An establishment where, for any form of consideration, one or more motion picture projectors, slide projectors or similar machines, for viewing by five or fewer persons each, are used to show films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

2. "Adult Bookstore" – An establishment which has as a substantial portion of its stock-in-trade and offers for sale for any form of consideration any one or more of the following:

(a) Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas;" or

(b) Instruments, devices or paraphenalia which are designed for use in connection with "specified sexual activities."

3. "Adult Cabaret" – A nightclub, bar, restaurant or similar establishment which regularly features live performances which are characterized by the exposure of "specified anatomical

areas" or by "specified sexual activities," or films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

4. "Adult Motel" – A motel or similar establishment offering public accomodations [sic] for any form of consideration which provides patrons with closed-circuit television transmissions, fi!ms, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

5. "Adult Motion Picture Theater" – An establishment where, for any form of consideration, films, motion pictures, video cassettes, slides or similar photographic reproductions are shown, and in which a substantial portion of the total presentation time is devoted to the showing of material which is characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas."

6. "Adult Theater" – A theater, concert hall, auditorium or similar establishment which, for any form of consideration, regularly features live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

7. "Establishment" – As used in Subsection C hereof, the "establishment" of an adult entertainment business shall mean and include any of the following:

(a) The opening or commencement of any such business as a new business;

(b) The conversion of an existing business, whether or not an adult entertainment business, to any of the adult entertainment businesses defined herein;

(c) The addition of any of the adult entertainment businesses defined herein to any other existing adult entertainment business; or

(d) The relocation of any such business.

8. "Massage Parlor" – An establishment where, for any form of consideration, massage, alcohol rub, fomentation, electric or magnetic treatment, or similar treatment or manipulation of the human body is administered, unless such treatment or manipulation is administered by a medical practitioner, chiropractor, acupuncturist, physical therapist or similar professional person licensed by the State of California. This definition does not include an athletic club, health club, school, gymnasium, reducing salon, spa or similar establishment where massage or similar manipulation of the human body is offered as an incidental or accessory service.

9. "Public Park" – A park, playground, swimming pool, beach, pier, reservoir, golf course or athletic field within the City of Los Angeles which is under the control, operation or management of the City Board of Recreation and Park Commissioners or the County Department of Beaches.

10. "Religious Institution" – A building which is used primarily for religious worship and related religious activities.

11. "School" – An institution of learning for minors, whether public or private, which offers instruction in those courses of study required by the California Education Code or which is maintained pursuant to standards set by the State Board of Education. This definition includes a nursery school, kindergarten, elementary school, junior high school, senior high school or any special institution of learning under the jurisdiction of the State Department of Education, but it does not include a vocational or professional institution or an institution of higher education, including a community or junior college, college or university.

12. "Sexual Encounter Establishment" – An establishment, other than a hotel, motel or similar establishment offering public accomodations, which, for any form of consideration, provides a place where two or more persons may congregate, associate or consort in connection with "specified sexual activities" or the exposure of "specified anatomical areas." This definition does not include an establishment where a medical practitioner, psychologist, psychiatrist or similar professional person licensed by the State of California engages in sexual therapy.

13. "Specified Anatomical Areas" – As used herein, "specified anatomical areas" shall mean and include any of the following:

(a) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus or female breasts below a point immediately above the top of the areolae; or

(b) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

14. "Specified Sexual Activities" – As used herein, "specified sexual activities" shall mean and include any of the following:

(a) The fondling or other erotic touching of human genitals, pubic region, buttocks, anus or female breasts;

(b) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation or sodomy;

(c) Masturbation, actual or simulated; or

(d) Excretory functions as part of or in connection with any of the activities set forth in (a) through (c) above.

15. "Substantial Enlargement" – As used in Subsection C hereof, the "substantial enlargement" of an adult entertainment business shall mean the increase in floor area occupied by the business by more than fifty percent (50%), as such floor area exists on the effective date of this section.

16. "Transfer of Ownership or Control" – As used in Subsections C and E hereof, the "transfer of ownership or control" of an adult entertainment business shall mean and include any of the following:

(a) The sale, lease or sublease of such business;

(b) The transfer of securities which constitute a controlling interest in such

business, whether by sale, exchange or similar means; or

(c) The establishment of a trust, gift or other similar legal device which transfers the ownership or control of such business, except for transfer by bequest or other operation of law upon the death of the person possessing such ownership or control.

C. PROHIBITION. No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theater, Adult Theater, Massage Parlor or Sexual Encounter Establishment within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park within the City of Los Angeles.

D. MEASUREMENT OF DISTANCE. The distance between any two adult entertainment businesses shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of each business. The distance between any adult entertainment business and any religious institution, school or public park shall be measured in a straight line, without regard to intervening structures, from the closest exterior structural wall of the adult entertainment business to the closest property line of the religious institution, school or public park.

E. EXCEPTIONS.

1. A person possessing ownership or control of an adult entertainment business which is within 1,000 feet of another such business or

within 500 feet of any religious institution, school or public park on the effective date of this ordinance shall be permitted to transfer such ownership or control within two (2) years of said effective date. The person acquiring such ownership or control, however, shall be required to discontinue said adult entertainment business within five (5) years from the date of said transfer of ownership or control, if such business continues to be within 1,000 feet of another such business or within 500 feet of any religious institution, school or public park.

2. A person possessing ownership or control of an adult entertainment business shall be permitted to transfer such ownership or control if such business is not within 500 feet of any religious institution, school or public park and the only other adult entertainment business or businesses within 1,000 feet of such business have been established under a variance from the requirements of this section, pursuant to the variance provisions set forth in Section 12.27 of this Code. This exception shall not, however, apply to an adult entertainment business which has been established under such a variance.

F. SEVERABILITY. If any provision or clause of this section or the application thereof to any person or circumstance is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other section provisions, clauses or applications thereof which can be implemented without the invalid provision, clause or application thereof, and to this end the provisions and clauses of this section are declared to be severable.

Sec. 2 The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, at its meeting of July 18, 1978.

REX E. LAYTON, City Clerk,
By /s/ [Illegible],
Deputy.

Approved Jul. 28, 1978

/s/ Tom Bradley,
Mayor.

Approved as to Form and Legality

7-11-78
BURT PINES, City Attorney,

By /s/ John C. Funk
JOHN C. FUNK
Deputy.

File No. 74-4521

Pursuant to Section 97.2 of the City Charter, the City Planning Commission on 6-29-78 recommended that this ordinance by adopted by the City Council.

/s/ Raymond J. Morrison
Secretary

APPENDIX F

ORDINANCE NO. 157538

An ordinance amending Section 12.70 of the Los Angeles Municipal Code to clarify its provisions.

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. Subdivision 7 of Subsection B of Section 12.70 of the Los Angeles Municipal Code is hereby amended to read:

7. "Establishment" – As used in Subsection C hereof, the "establishment" of an adult entertainment business shall mean and include any of the following:

(a) The opening or commencement of any such business as a new business;

(b) The conversion of an existing business, whether or not an adult entertainment business, to any of the adult entertainment businesses defined herein; *or*

(c) The relocation of any such business.

Sec. 2. Subsection B of Section 12.70 of the Los Angeles Municipal Code is hereby amended by adding Subdivision 17 thereto, to read as follows:

17. "Adult Entertainment Business" – Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theatre, Adult Theatre, Massage Parlor, or Sexual Encounter Establishment, as defined herein, and

each shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment.

Sec. 3. Subsection C of Section 12.70 of the Los Angeles Municipal Code is hereby amended to read:

C. Prohibition. No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an adult entertainment business within 1,000 feet of another adult entertainment business or within 500 feet of any religious institution, school or public park within the City of Los Angeles. Notwithstanding any provision of the Los Angeles Municipal Code to the contrary, no person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof, or the increase of floor area of any adult entertainment business in any building, structure or portion thereof containing another adult entertainment business.

Sec. 4. Subsection E of Section 12.70 of the Los Angeles Municipal Code is hereby amended by adding Subdivision 3 thereto, to read as follows:

3. Except for an adult entertainment business required to be discontinued pursuant to Subdivision 1 of this Subsection, if more than one adult entertainment businesses exists in the same building, structure or portion thereof, then all may be continued until March 10, 1985. At that time all shall be discontinued except those established prior to September 1, 1978; but if none of the adult entertainment businesses were established prior to September 1, 1978, then all shall be discontinued except

for one, and in case of a dispute the adult entertainment business established first shall have the priority right to continue. However, the right to continue an adult entertainment business until March 10, 1987 may be granted pursuant to Section 12.27-B,8.

Sec. 5. Subdivision 8 is hereby added to Subsection B of Section 12.27 of the Los Angeles Municipal Code to read as follows:

8. Continuance of Adult Entertainment Businesses

An adult entertainment business required to be discontinued pursuant to Section 12.70-E,3 may be continued until March 10, 1987 if the Zoning Administrator finds that:

(i) the adult entertainment business is subject to a written lease, entered into prior to March 10, 1982, with a termination date extending beyond March 10, 1985; or

(ii) that discontinuance of the adult entertainment business by March 10, 1985 will result in undue financial hardship, because the adult entertainment business involves the investment, made prior to March 10, 1982, of money in real property, improvements, or stock in trade.

No application for continuance shall be granted if the Zoning Administrator makes a finding that the adult entertainment business is in violation of any provision of this Chapter, and the violation was not corrected after notice being given thereof.

An application for a continuance of an adult entertainment business shall be filed in the Office of Zoning

Administration upon a form and accompanied by such data and information as has been prescribed for that purpose. Each such application shall be verified by the owner or lessee of the property involved. No fee shall be required.

Upon filing of a verified application, the Zoning Administrator shall investigate the matter and make a decision thereon as expeditiously as possible. Such decision shall be made within 75 days from the date the matter is filed, or within such extended period of time as may be mutually agreed upon by the applicant and the Zoning Administrator. A copy of the Zoning Administrator's findings and determination shall be placed on file in the City Planning Department and a copy of the determination furnished to the applicant, the Department of Building and Safety, and the Director of Planning. If necessary, the Zoning Administrator may set the matter for hearing giving notice to the applicant and to the other interested parties of the time and place of such hearing.

Appeals from determinations by the Zoning Administrator may be taken to the Board in the same manner prescribed by Section 12.28 of this Code. No determination shall become effective until 15 days have elapsed from the date of mailing a copy of the written determination to the applicant. During this period an appeal may be filed with the Board by any person aggrieved by the determination, or by any officer, board, department or bureau of the City. An appeal shall stay all proceedings in furtherance of the action appealed from pending its determination.

Sec. 6. Statement of Purpose

There is concern on the part of public officials and residents of the City of Los Angeles regarding the adverse impacts which result from the continued concentration of adult entertainment business. Based upon this concern, the Los Angeles City Council in 1977 instructed the City Planning Department to conduct a comprehensive study, with the assistance of other City agencies, to determine whether and to what extent the concentration of such adult entertainment businesses has a blighting and degrading effect upon the neighborhoods in which they are situated.

The findings of this study, which included testimony from public hearings, indicated that the concentration of such adult entertainment businesses tends to result in the blighting and degrading of the areas of such concentration. In order to prevent the further concentration of these adult entertainment businesses and to protect the character of the City's neighborhoods, the City Council enacted Section 12.70 of the Los Angeles Municipal Code known as the "Adult Entertainment Ordinance" which prohibits the establishment of an adult entertainment business, as defined therein, within 1,000 feet of another such business, or within 500 feet of any religious institution, school, or public park.

Nevertheless, there have been a number of instances in which two or more adult entertainment business [sic] have been established or maintained at the same location or operated as a single commercial enterprise. This concentration of adult entertainment businesses tends to have an adverse impact on the neighborhood in which

they are located and is contrary to the dispersal approach taken by the City in enacting the Adult Entertainment Ordinance.

The purpose of this ordinance is to clarify existing provisions of the Adult Entertainment Ordinance. In enacting this ordinance in 1978, the City Council did not intend to permit the establishment of more than one adult business in the same building or at the same location. This ordinance will clarify Council's intent in that regard and provide reasonable amortization provisions applicable to businesses established after September 1, 1978 in a manner inconsistent with Council's intent.

Sec. 7. Severability

If any section, subsection, or subdivision of this Ordinance is held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining provisions of this Ordinance.

Sec. 8 The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, at its meeting of Mar. 16, 1983.

ELIAS MARTINEZ, City Clerk,

By /s/ Edward W. [Illegible], Deputy.

Approved Mar. 22, 1983

/s/ Tom Bradley, Mayor.

Approved as to Form and Legality

2/24/83
IRA REINER, City Attorney,

By /s/ Claudia McGee Henry
CLAUDIA McGEE HENRY
Assistant City Attorney

File No. 82-0155

Pursuant to Section 97.8 of the City Charter, approval of this ordinance recommended for the City Planning Comission

See attached report.

/s/ Calvin S. Hamilton
Director of Planning ka

APPENDIX G

ORDINANCE "A"

The Los Angeles Daily Journal C436

ORDINANCE NO. 158579

An Ordinance amending Section 12.70 of the Los Angeles Municipal Code and providing for an exception therefrom.

Section 1. Subsection C of Section 12.70 of the Los Angeles Municipal Code is hereby amended to read:

C. Prohibition. No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an adult entertainment business within 1,000 feet of another adult entertainment business, or within 500 feet of a religious institution, school, or public park within the City of Los Angeles. No person shall cause or permit the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof, or the increase of floor area of any adult entertainment business in any building, structure or portion thereof containing another adult entertainment business.

No person shall cause or permit the establishment, or substantial enlargement of an adult entertainment business within 500 feet of any lot in an "A" or "R" zone, or within the "CR", "C1", or "C1.5" zones in the City of Los Angeles.

Sec. 2. Subsection E of the Section 12.70 of the Los Angeles Municipal Code is hereby amended by adding Subdivision 4 thereto, to read as follows:

4. An adult entertainment business may be established and maintained pursuant to Section 12.22-A,20.

Sec. 3. Subsection A of Section 12.22 of the Los Angeles Municipal Code hereby amended by adding subdivision 20 thereto to read as follows:

20. Adult Entertainment Businesses.

(a) Notwithstanding the prohibition contained in Section 12.70-C, a person may establish or transfer ownership or control of an adult entertainment business on a lot within 500 feet of an "A" or "R" zone, if a site consistent with Section 12.70-C is not reasonably available elsewhere in the City for the establishment of the subject adult entertainment business. A site is "reasonably available" elsewhere in the City if it satisfies all of the following criteria:

(i) Its use as a proposed adult entertainment business is consistent with all applicable zoning regulations, including Section 12.70-C.

(ii) It is available for use, purchase, or rental as an adult entertainment business.

(iii) It has adequate street access, street lighting and sidewalks.

(iv) It is at least 500 feet away from any uses which are or may become obnoxious or offensive by reason of emission of odor, dust, smoke, noise, gas, fumes, cinders, refuse matter or water carried waste.

This exception shall not apply to massage parlors or sexual encounter establishments.

b) Prior to the establishment, or transfer of ownership or control, of an adult entertainment business pursuant to this Subdivision, an application for an exception shall be filed in the Office of Zoning Administration upon a form prescribed for that purpose, identifying the present or proposed location of the subject adult entertainment business, and accompanied by data supporting the exception request, and the fee provided for in Section 19.01-N of this Code.

An application for an exception shall be reviewed in accordance with the procedures described in Section 12.24-C,3 to the extent applicable. However, a hearing shall be held and decision made within 60 days from the date of filing of an application. An exception shall be approved if it meets all the requirements of paragraph (a) above. An appeal from the determination of the Zoning Administrator on whether an exception meets all of the requirements of paragraph (a) may be taken to the Board and Council in the same manner as prescribed in Section 12.28 for appeals from Conditional Uses enumerated in Section 12.24-C,1.1. However, decision on any appeal shall be made within 30 days of the expiration of the appeal period.

If the Zoning Administrator, Board or Council, disapproves an exception request, then a finding of fact shall be made showing wherein the proposed exception fails to meet the requirements of paragraph (a).

Sec. 4. Section 19.01 of the Los Angeles Municipal Code is hereby amended by adding a Subsection N to read as follows:

N. ADULT ENTERTAINMENT BUSINESS EXCEPTION.

Type of Application	Filing Fee	Fee for Each Appeal
Exception from the Prohibition Against Adult Entertainment Businesses Within 500' of an "A" or "R" Zone.	$200.00	One-half filing fee

Sec. 5. Severability.

If any provision or clause of this ordinance or the application thereof to any person or circumstance is held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other section provisions, clauses or applications thereof which can be implemented without the invalid provisions, clause or application thereof, and to this end the provisions and clauses of this section are declared to be serverable [sic].

Sec. 6 The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, at its meeting of Dec. 16, 1983.

ELIAS MARTINEZ, City Clerk,

By /s/ Edward W. [Illegible],
Deputy.

Approved Dec. 16, 1983

/s/ Tom Bradley,
Mayor.

Approved as to Form and Legality

Dec. 16, 1983
IRA REINER, City Attorney,

By /s/ Claudia McGee Henry
CLAUDIA McGEE HENRY
Assistant City Attorney

File No. C.F. 81-3526